Chapter 1.

The Nature of the Interest Owned by Mortgagor and Mortgagee

1. The Security Theory and Its Implications

Notes

1. It is well recognized in Texas that a mortgage of real property is simply "a security for a debt." *Astugueville v. Loustaunau*, 61 Tex. 233, 238 (1884) (stating "[t]he existence of a debt to be secured is the very foundation on which a mortgage or other lien depends; when the one is not found the other does not exist"). Thus, to constitute a mortgage the grantor must have intended to pledge real property as security for a debt. *See Well v. Hilburn*, 129 Tex. 11, 98 S.W.2d 177, 180 (1936). A deed of trust "is in legal effect but a mortgage with a power of sale." *S. Trust & Mortg. Co. v. Daniel*, 143 Tex. 321, 326, 184 S.W.2d 465, 467 (1945); *see also Johnson v. Snell*, 504 S.W.2d 397, 399 (Tex. 1974) (stating that a "deed of trust is in legal effect a mortgage with power to sell on default"). The power of sale authorizes a nonjudicial foreclosure of the property; whereas, under a mortgage, the mortgagee must pursue a judicial foreclosure.

2. Review the Deed of Trust, Special/General Warranty Deed with Vendor's Lien, and Real Estate Lien Note in the Appendix to this Book. Pay special attention to the language of grant in the Deed of Trust and Special/General Warranty Deed. A deed of trust, like a warranty deed, contains language of grant; however, it is clear under the Texas law of mortgages that the mortgagor is not conveying title to the property to the mortgagee, but only granting a lien on the property.

3 An understanding of the present Texas law of mortgages begins with an understanding of its historical roots. The constitution of the Republic of Texas authorized the congress to "introduce, by statute, the common law of England, with such modifications as our circumstances, in their judgment, may require." Repub. Tex. Const. of 1836, art. IV, § 13. The congress soon obliged. Act approved Jan. 20, 1840, 4th Cong., R.S. § 1, 1840 Repub. Tex. Laws 3-4 (enacting the "Common Law of England so far as not inconsistent with the Constitution or Acts of Congress now in force"). The first Constitution of the State of Texas provided that the laws of the Republic continued as effective after statehood until they expired or were altered or repealed. Tex. Const. of 1845, art. XIII, § 3. Thus, the English common law of mortgages became part of the jurisprudence of the state of Texas from the earliest times.

4. In *Humble Oil & Refining Co. v. Atwood*, 150 Tex. 617, 244 S.W.2d 637 (1952) the Texas Supreme Court briefly discussed the common law of mortgages and its adoption in Texas. The court stated:

> The early common law recognized two kinds of landed securities. BLACKSTONE in Sec. III of Chap. X (of Estates Upon Condition) p. 156, identifies these as ". . . vivum vadium, or living pledge; and mortuum vadium, dead pledge, or mortgage." He defines a mort-

gage as a grant of fee upon condition of repayment of a debt and this has come down as the traditional language used in most mortgage forms.

Originally, possession passed by livery of seizin to the mortgagee. And back of this lies one of the historical reasons for the use of language of grant in a mortgage. Because the distinction between interest and usury was a slow growth, the emergency of the concept of a return upon money capital (as distinguished from land) brought on an intense conflict between the ecclesiastical and common law courts. During a long period any return upon a loan might be declared usury, the parties to it caught in the friction between the common law and the ecclesiastical jurisdictions, and the unfortunate creditor subjected to fine, imprisonment, ransom at the King's pleasure, and exposure on the "pillaire, to their open rebuke and shame." So the creditors sought refuge in the feudal tenures and secured a return upon their loans in the form of rents and profits accompanying the right of possession. As the concept of usury changed and the law recognized interest as "toothless" usury, and as Chancery developed the equity of redemption, possession remained with the mortgagor, but the form of the conveyance continued in general use, and often plagues the courts to this day. OSBORNE, ON MORTGAGES, Sec. 5.

Because the mortuum vadium was a use of legal machinery to accomplish a purpose for which it had not been designed, many harsh results flowed from it, for ". . . the common law knew of no better way to treat debtors than to make them live up to their bargains, ..." THOMAS, ON MORTGAGES, p. 6. To the common law judges, thoroughly drilled in the formal discipline of Traditional Logic, the law often became an exercise in logic. Walled in by the rigidity of their syllogisms, they were untouched by the currents of empirical thought which turned Chancery towards the Civil Law. The result is described by COOTE in his ON MORTGAGES, Chap. I, (ii), p. 4. "Thus mortgages stood at common law, and it is difficult to conceive, if the Courts of Law had been so inclined (which it does not seem they were), on what principle they could have proceeded in giving the debtor relief. The forfeiture was complete; the mortgagee, by the default of the mortgagor, had become the absolute owner of the estate; it could not be divested from him without a reconveyance, and there remained no remedy short of an actual legislative enactment, without disturbing the settled landmarks of property."

To remedy this situation, Chancery evolved the equity of redemption by holding that although ". . . they could not alter the legal effect of the forfeiture at common law, they operated on the conscience of the mortgagee, and, acting in personam, they declared it unreasonable that he should retain for his own benefit what was intended as a mere security; and they adjudged * * * that the mortgagor had an equity to redeem on payment . . . notwithstanding the forfeiture at law. * * * The judges of common law strenuously opposed the introduction of this novelty; and though ultimately defeated by the increasing power of equity, they nevertheless in their own Courts still adhered to the rigid doctrine of forfeiture, ..." COOTE, ON MORTGAGES, Chap. II, (iii) pp. 12, 13. *See also* OSBORNE, ON MORTGAGES, Sec. 1, p. 6.

There followed a period of confusion caused by jealousy between the Courts of Law and Equity. ". . . For a number of years both law and equity courts exercised . . . concurrent jurisdiction over mortgages, resulting in great confusion, more especially while the courts of the common law continued to be presided over by men whose early training had led them to regard the interference of the courts of equity as an offensive innovation. But in course of time the justness of the decrees of the chancellors gradually came to be recog-

nized by the common-law courts and were acquiesced in by them." JONES, ON MORTGAGES, Sec. 9, p. 11."

The equitable views finally made their way into the common law in the opinions of Lord Mansfield who was, however, criticized for having "on his mind prejudices derived from his familiarity with the Scottish law, where law and equity are administered in the same courts. * * *." POWELL, ON MORTGAGES, p. 267.

In America, the states are split into two main groups on mortgages. Some states give effect to the language of grant in a mortgage and are referred to as "title" states for the reason that they hold title passes. The other group are called "lien" states for they hold that neither title nor possession passes. There are many variations between them.

Our Texas mortgage developed in a blended system of Law and Equity administered in one court. In *Stephens v. Sherrod*, *supra*, it is recognized, upon authority of *Kent* and *Story*, that our mortgage grew out of sales upon condition of non-payment of a debt, or accompanied by a defeasance. One of the differences between the mortuum vadium and the Texas mortgage is that if the condition were not faithfully complied with under the mortuum vadium, the land was forever lost, while generally under our Texas mortgage it was early determined that the legal title remains in the mortgagor and can only be transferred by foreclosure, or by sale where power of sale is contained in the instrument. Although to this day the early form of an absolute grant with a defeasance is in common use, now by statute and court decision a mortgage is a mere lien regardless of the language used in the instrument itself. *Duty v. Graham*, 12 Tex. 427; *Willis v. Moore*, 59 Tex. 628; *Hudson v. Eisenmayer, Sr., Milling & Elevator Co.*, 79 Tex. 401, 15 S.W. 385; *Carroll v. Edmondson*, Tex. Com. App., 41 S.W.2d 64. As a result of Chancery action in developing the equity of redemption, the common law courts were forced to superimpose upon the parol evidence rule an exception allowing a deed absolute to be adjudicated a mortgage if the parties intended that it be security for a debt.

Willis
v.
Moore

59 Tex. 628
(1883)

J. A. Gill and Lewis Moore were farming in partnership, or together, on Moore's plantation, under a contract to divide equally the net proceeds of the crop.

Before their contract, Moore had mortgaged his plantation, and when Gill had on the place, ungathered, a crop of 1881, the land was sold under this mortgage; and the plaintiff Willis bought, and he and J. A. Gill made a contract to divide the proceeds of the crop according to the contract with Moore. Before the fund was paid over to Willis, A. J. Gill claimed it under a contract with Moore of date after the mortgage, but before the sale thereunder; and by agreement the money was deposited with H. G. Carter for whoever was entitled to it.

To recover this money, on the 18th day of February, 1882, Willis, the appellant, brought this suit against Carter, A. J. and J. A. Gill, Lewis Moore and Ransom Moore.

The cause was tried August 26, 1882, without a jury, and resulted in a judgment for the defendants, by which A. J. Gill recovered from Carter this fund.

. . . the conclusions of the court below, as to the law, were as follows, viz.:

The deed of trust being in the nature of a mortgage and only an incident of the debt, the paramount title to the land remaining in the mortgagor, Moore, I conclude that Lewis Moore had the right to dispose of the emblements at any time before said land was advertised and sold, and said sale of the interest of said Moore, in the crop raised on said land, having been sold by him to A. J. Gill, and said Gill having paid a full and fair consideration therefor, in good faith, the title and right thereto passed to A. J. Gill on the 1st of August, 1881, before said land was advertised to be sold under the trust deed; and the plaintiff acquired no right to said crop, or the proceeds thereof, by reason of his purchase of said land at the sale made by the trustee.

* * * *

STAYTON, J.

The deed in trust made by Lewis Moore to secure the notes executed by him to Reed & Smith, having been duly recorded, it must be held that A. J. Gill bought the interest of Lewis Moore in the crop upon the land on the 1st of August, 1881, with notice of whatever right the appellant, by virtue of the transfer of the notes, which carried with them as an incident the security evidenced by the trust deed, had in the crops then standing ungathered upon the land.

There might be some difficulty in determining the true relation which existed between Lewis Moore and J. A. Gill, under the agreement of date December 24, 1877; but it is treated by appellant's counsel as a partnership, in which, for their mutual benefit, the land was cultivated by the latter, the material for that purpose being in part furnished by each, the net proceeds to be equally divided between them. This is probably the true relationship of the parties, rather than that they were landlord and tenant, and we will so consider them in disposing of the case. It does not appear when the notes to Reed & Smith matured, but it is found that they were due and unpaid on the 8th of September, 1881, at which time the substituted trustee sold the land, and thereby the appellant became the owner thereof.

The question for our decision then is, is the purchaser of mortgaged lands, as against the mortgagor or any person claiming under him by a purchase of the crops, entitled to such crops as were standing ungathered upon the land at the time of his purchase? A. J. Gill does not necessarily stand in the same relation to this question as would Lewis Moore were he the claimant.

That in England and in many states of this Union, the mortgagee is deemed the holder of the legal title, cannot be questioned; and that upon such title he may maintain ejectment against the mortgagor. Where such is the rule, many decisions are to be found in which it is held that neither the mortgagor, nor a tenant under him claiming through a lease made after the execution of the mortgage, is entitled to carry away the crops growing upon the mortgaged land at the time of foreclosure or actual entry by the mortgagee; and this upon the theory that, from the date of the mortgage, the mortgagor is but a tenant at sufferance; and that a lease made by him, being unauthorized, works a disseizin.

* * * *

In this state it has been held, from an early day, that a mortgage is but a security for a debt; that the title to property mortgaged remains in the mortgagor, and with it the right of possession, which is one of the ordinary incidents of title. *Duty v. Graham*, 12 Tex., 427; *Wright v. Henderson*, 12 Tex., 44; *Wootton v. Wheeler*, 22 Tex., 338.

Such being the legal effect of a mortgage in this state, it will be readily seen that the foundation upon which the rights of mortgagees is based in England and in some of the states wholly fails:

1st. There the paramount title is held to be in the mortgagee; here the paramount title remains in the mortgagor, and no estate passes to the mortgagee unless through foreclosure.

2d. There the right to the immediate possession of the mortgaged property vests in the mortgagee, with the consequent right to appropriate the fruits and revenues without liability to account, unless called upon to do so in a proceeding to enforce the equity of redemption; here no right to the possession, nor to the fruits and revenues so long as the mortgage stands unforeclosed, unless under some proceeding peculiarly equitable.

3d. There the mortgagor, under the conflict of authority, is held to be either a tenant at sufferance or a tenant at will, with no power to do aught else than, under the strict rules of the common law, a tenant with the feeblest tenure may do, a lease by him operating as a disseizin of the mortgagee, and making himself and his lessee tort-feasors; here he is the owner of the fee, if such be his estate in the land which he mortgages, recognizing no landlord, neither a tenant at will nor a tenant at sufferance, in any sense in which these terms can be legitimately applied—for the owner cannot be, in the nature of things, the tenant of any one; he has power to lease without disloyalty to any one, his lease, if made after mortgage, subject, however, to be terminated in case of foreclosure before its expiration.

The reason sometimes given, why a mortgagor should not be permitted to have the crops still standing upon the land at time of foreclosure, is, that he may obtain their value in account upon bill to redeem; with us this reason can have no effect, for there is no such thing in our practice as the right to redeem after foreclosure, which is made by sale.

The crops were planted, cultivated, and, in fact, must have been almost, if not quite, matured before the sale in September, and while the paramount title to the land upon which they grew was still in Moore, the vendor of Gill, Moore sold them. The element of uncertainty, in so far as Gill was concerned, as to the continuance of title in his vendor, was very nearly as great as though he had held as tenant at will. The direction of the creditor to sell under the deed of trust and thereby place in himself or some other person the title to the land, was an act of will, without the exercise of which the paramount title to the land would continue in Moore; and even such exercise of the will would not necessarily affect that result; for Moore might be able to pay the indebtedness and thereby effectually prevent the divestiture of his title.

Where the mortgage is held to vest the title in the mortgagee, no such elements of uncertainty exist; he may enter whenever he pleases.

The right of a person purchasing under a foreclosure of a mortgage, where it is held that the mortgage passes no estate, but is a mere security to have the crops on the land at time of foreclosure, is questioned by Mr. Washburn. 1 WASHBURN ON REAL PROPERTY, 124. The reasons for the rule in question not existing here, it seems to us the rule must be held not to exist.

The deed of trust seems to evidence the fact that the parties contemplated, even if sale was made under it, that Moore and those claiming under him should not at once surrender the land to the purchaser, but from the time of the sale should attorn to the purchaser, which carries with it, by implication, at least an agreement that, from such time, Moore or his assigns should, as tenants, recognize the purchaser as the landlord and pay rent for the land from the time of foreclosure.

By attornment is meant "the act of recognition of a new landlord, implying an engagement to pay rent and perform covenants to him. The word is taken from the feudal law, where it signifies

the transfer, by act of the lord and consent of the tenant, of the homage, service, fealty, etc., of the tenant to a new lord who had acquired the estate." ABBOTT'S LAW DICTIONARY.

It is true that the trust deed provides that the holding shall be as tenant at sufferance; but there can be no such thing as tenant by sufferance when the tenancy is the result of agreement such as is found in the trust deed, with reference to which the purchaser must be presumed to have bought, and by which he is as much bound as though he had been a party to that instrument; and in the absence of something in the agreement evidencing that it was the intention of the parties, after the foreclosure, to have their rights to stand strictly upon the relation of landlord and tenant at sufferance, the parties should be held to have intended that such a tenancy should exist as is created by agreement; at least a tenancy at will, which would carry with it the right to the crops then nearly or quite matured, but ungathered at time of foreclosure.

A tenancy by sufferance "is of such a nature as necessarily implies an absence of any agreement between the owner and the tenant, and if express assent is given by the owner to such possession the tenancy is thereby instanter converted into a tenancy at will or from year to year, according to the circumstances." WOOD'S LANDLORD AND TENANT, 15. It matters not what parties may designate such a tenancy.

This view of the case would be conclusive of the question, but there is another view of the case which is equally so.

A mortgage being simply a lien to secure the payment of a debt, it cannot be held to give to a mortgagee or person purchasing under it any greater right to ungathered crops standing upon the mortgaged land than would a person have who purchased under a lien acquired in any other manner prior to the time the crop was planted, or the right to plant it accrued. *Hogsett v. Ellis*, 17 Mich., 363.

"Crops, whether growing or standing in the field ready to be harvested, are, when produced by annual cultivation, no part of the realty. They are, therefore, liable to voluntary transfer as chattels. It is equally well settled that they may be seized and sold under execution." FREEMAN ON EXECUTIONS, 113, and citations; BENJAMIN ON SALES, 120. Such being the case, if there be nothing in the contract of the parties by which land is conveyed, nor in the circumstances attending the sale, evidencing the intention of the parties that crops nearly or quite matured should pass with land sold, it is difficult to see upon what principle it can be held that property strictly personal in its character should pass by an instrument which upon its face purports only to convey land. The weight of authority, however, is to the effect that such crops will pass by the sale of the land if they belong to the owner of the land at time of sale. The application of this rule to sales made under mortgages, having only such effects as mortgages here are held to have, upon crops produced many years after the mortgage was given, need not further be considered. As, however, the crops are separate and distinct in their nature from the land upon which they grow, the ownership of the one, even on mortgaged property, may be in one person, and the title to the other in another; and whenever crops growing or standing upon land covered by a lien given by the owner of the land, or acquired by law, have in law or in fact been severed in ownership, or actually severed from the land prior to sale of the land under the lien, title thereto will not pass by the foreclosure of the lien.

A mortgagor is entitled to sever in law or fact the crops which stand upon his land at any time prior to the destruction of his title by sale under the mortgage; this results from his ownership and consequent right to the use and profits of the land, and the mortgage is taken with knowledge of that fact.

* * * *

There is no error in the judgment, and it is affirmed.

Notes

1. In *Millingar v. Foster*, 17 S.W.2d 768, 768-69 (Tex. Comm'n App. 1929, judgm't adopted) the court further elaborated upon the rights of the mortgagor to sever crops prior to foreclosure of the lien securing a debt in the following language:

> It is settled that annual crops growing on mortgaged land do not pass to the purchaser of the land at the foreclosure sale, if the mortgagor has previously severed the crops from the land, either actually or constructively. *Willis v. Moore*, 59 Tex. 638, 46 Am. Rep. 284. With like effect, the claim for rent which the mortgagor, as landlord, holds against his tenant to whom he has let the mortgaged land for the year, whether such claim be payable in money (*Security Mortgage & Trust Co. v. Gill*, 8 Tex. Civ. App. 358, 27 S. W. 835, writ refused), or whether it be payable in kind from the crops to be grown by the tenant (*Bowyer v. Beardon*, 116 Tex. 337, 291 S. W. 219), may be assigned by the mortgagor; and such assignment operates as a constructive severance from the land, of all the rights which appertain to such rent claim.

2. As Texas follows the lien theory of mortgages, the mortgagee is not the owner of the property, and thus is not entitled to actual possession of the property or to the rents or profits from the property. Thus, it was a common practice to place terms in the deed of trust, or in an accompanying document, assigning to the mortgagee as additional security for the payment of the debt, all of the mortgagor's interest in rents due after the date of the mortgage documents. *See Taylor v. Brennan*, 621 S.W.2d 592, 593 (Tex. 1981). The assignment of rents could be drafted to be either a security pledge of the rents or an absolute transfer of title to the rents. An assignment of rents that was classified as a security pledge was bound by the common law rule that the assignment did not become operative until the mortgagee either obtained possession of the property, impounded the rents, secured the appointment of a receiver, or took some similar affirmative action. *See id*. at 594. An absolute assignment of rents, however, did not create a security interest, but operated to pass title to the rents, and transferred the right to the rents automatically upon the happening of some specified event, such as default in payment of the debt secured by the mortgage. *Id*. However, on June 17, 2011, a new section of the Texas Property Code went into effect. This section, as amended, provides:

> (a) An enforceable security instrument creates an assignment of rents arising from real property described in that security instrument, unless the security instrument provides otherwise or the security instrument is governed by Section 50(a)(6), (7), or (8), Article XVI, Texas Constitution.
>
> (b) An assignment of rents creates a presently effective security interest in all accrued and unaccrued rents arising from the real property described in the security instrument creating the assignment, regardless of whether the security instrument is in the form of an absolute assignment, an absolute assignment conditioned on default or other event, an assignment as additional security, or any other form. The security interest in rents is separate and distinct from any security interest held by the assignee in the real property from which the rents arise.

(c) An assignment of rents does not reduce the secured obligation except to the extent the assignee collects rents and applies, or is obligated to apply, the collected rents to payment of the secured obligation."

TEX. PROP. CODE ANN. § 64.051 (West Supp. 2013).

Thus, at the present time both the pledge of rents as additional security and the absolute assignment of rents are treated as mere security interests, and therefore the use of language stating that the rents are absolutely assigned will no longer operate to transfer title to the rents or transfer the right to the rents automatically upon the happening of a specified condition.

3. As noted above one of the ways that an assignment of rents as additional security may become operative is as a result of the appointment of a receiver. Texas law provides that:

(a) A court of competent jurisdiction may appoint a receiver:

* * * *

(4) in an action by a mortgagee for the foreclosure of the mortgage and sale of the mortgaged property;

* * * *

(c) Under Subsection (a)(4), the court may appoint a receiver only if:

(1) it appears that the mortgaged property is in danger of being lost, removed, or materially injured; or

(2) the condition of the mortgage has not been performed and the property is probably insufficient to discharge the mortgage debt."

* * * *

TEX. CIV. PRAC. & REM. CODE ANN. § 64.001 (West 2008).

4. The parties can also provide in the deed of trust for the appointment of a receiver in the event of default to collect rents which were pledged as additional security. *See Riverside Props. v. Teachers Ins. & Annuity Ass'n of Am.*, 590 S.W.2d 736, 738 (Tex. Civ. App.—Houston [14th Dist.] 1979, no writ) (holding that the language in the deed of trust concerning the appointment of a receiver while not binding on the trial court could be considered by the court concerning the intent of the parties).

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2. The Vendor's Lien; Superior Title; and Executory Contracts

Notes

1. In Texas when a vendor sells property and there is unpaid purchase price, a vendor's lien arises against the property to secure the payment of the unpaid purchase price. An express vendor's lien can be reserved in the deed and/or in the real estate lien note. The vendor's lien can also be implied in the event that it is not reserved in either of these two instruments. An express vendor's lien is considered to be merely "incident" to the note, and is not separably assignable, but can be transferred by the assignment of the note in which it was expressly reserved. The vendor's lien is separate and distinct from a deed of trust or mortgage, but like the deed of trust or

mortgage, it is security for payment of the debt it secures. A vendor's lien, like a mortgage, can only be foreclosed through a judicial proceeding.

2. When a vendor's lien is reserved in the deed, and the purchase price remains unpaid, the contract for sale of property is considered to be executory—meaning that one or both of the parties to the real estate sale have something to do to complete the sale of property. The vendee, of course, has to pay the unpaid purchase price; and the vendor needs to transfer the legal title to the vendee. Texas recognizes when a vendor's lien is reserved in the deed, that the vendor retains legal title in the property until the purchase price is paid. This legal title is referred to as superior title. Upon payment of the purchase price, the superior title automatically vests in the vendee. However, even though the purchase price has not been paid and the vendor retains the superior title, the real estate sale is considered to be fully executed as to third parties. In the event that a vendor's lien is not reserved in the deed, the deed is referred to as a deed absolute, as both equitable and legal title (the superior title) to the property have been conveyed to the vendee.

Rooney
v.
Porch

239 S.W. 910
(Tex. Comm'n App. 1922, judgm't adopted)

HAMILTON, J.

T. E. Rooney brought against W. W. Porch this suit in trespass to try title to 58.7 acres of land, a part of 228.7 acres in Harris County, Tex., patented to Thomas Desel. Desel conveyed the 228.7 acres to John H. Ruff on October 6, 1892, for a consideration of $609.86 cash and two vendor lien notes for $686.10 and $533.63, due in one and two years, respectively, after the date of conveyance. The deed reserved a vendor's lien, and the notes were further secured by a deed of trust on the land.

On November 19, 1892, Ruff executed a deed conveying the 58.7 acres, in litigation here, to T. J. Pierce for a consideration of $156.53 cash, and the assumption and agreement by Pierce to pay $156.53 on each of the two notes given by Ruff in part payment of the purchase money for the 228.7 acres, above described. This deed expressly reserved a vendor's lien to secure the payment of the sums agreed to be paid by Pierce on those two notes.

On December 20, 1892, Desel transferred the notes, above described, executed by John H. Ruff, to C. Cusack.

On January 18, 1907, Ruff conveyed the whole of the 228.7 acres to John C. Morrison.

On February 7, 1907, C. Cusack released the liens upon the land, securing the two notes which had been transferred to him by Desel. This release recites that the two notes had been fully paid, canceled, and surrendered, and in consideration of such payments Cusack releases and quitclaims unto John H. Ruff all right, title, and interest in the land by virtue of the liens thereon securing said notes.

> The title conveyed to Morrison on January 18, 1907, was conveyed to appellee Porch on May 15, 1908, by J. A. Freedman, who held same through mesne conveyance from Morrison.

> On June 7, 1909, T. J. Pierce, for a recited consideration of $50 and other considerations not stated, conveyed the 58.7 acres conveyed to him by Ruff to Mary E. Scott by deed of general warranty.
>
> On January 6, 1912, Ruff executed a release to Pierce, reciting that he had conveyed the 58.7 acres to Pierce on December 19, 1892, and as part consideration therefor Pierce had assumed and agreed to pay $156.53 in one year and $156.53 in two years on the incumbrances then existing on the land, and that 'said notes and all interest thereon have been fully paid and canceled and surrendered to my entire satisfaction.'
>
> On May 14, 1916, Mary E. Scott conveyed said 58.7 acres to A. E. Coles, who on May 8, 1916, conveyed it to appellant Rooney.
>
> There was no testimony showing that the two amounts of $156.53, each assumed by Pierce, were paid by him.

The trial in the district court without a jury resulted in a judgment in favor of Porch, defendant in error. Rooney appealed, and the Court of Civil Appeals affirmed the judgment. 223 S. W. 245. He then sought and obtained a writ of error.

Ruff is the common source of title. Rooney claims from Ruff through Pierce. Porch claims from Ruff through Morrison. Rooney's theory as plaintiff was that the purchase money was presumed to have been paid, and that Porch's title was void because his vendor, Ruff, had no title to the land at the time he executed the deed to Porch.

The title that remains in a vendor of land who reserves in his deed a lien to secure the purchase money is superior in the sense that the vendee cannot assert his title against the vendor unless the vendee has paid the purchase money. Except, as security for the purchase-money debt, the title is in the vendee. When the purchase money is paid, all semblance of title in the vendor ceases, and title absolute vests in the vendee.

Unrelated to the lien retained to secure the purchase money, the title remaining in the vendor [editor: the superior title] is merely a right in the vendor to rescind the sale and recover the land by suit or take it back under certain circumstances, without suit, on failure or refusal of the vendee to pay the purchase price. These rights are merely means provided by law to secure to the vendor the purchase money, or in lieu thereof the land itself, as a security against loss of both the purchase money and the land. *Carey v. Starr*, 93 Tex. 508, 56 S. W. 324; *Douglass v. Blount*, 95 Tex. 369, 67 S. W. 484, 58 L. R. A. 699.

In the former case the Supreme Court said:

> From the time it was first announced that the reservation of lien in a deed reserved the superior title to the vendor, there has been a continuous and persistent effort to push it to the limit of executory contracts for the sale of land, but this court has steadily resisted that effort and has uniformly limited the vendor's title to the character of security for the purchase-money debt, and, when the debt has been paid, the title of the vendor ceases.

In the case of *Maverick v. Perez* (Tex. Com. App.) 228 S. W. 148, it is said:

> The rights of the vendor of real estate in property conveyed under executory contract are measured by the terms of the contract, and the right to rescind and recover the property upon the strength of the vendor's so-called superior title, is but an alternative remedy which the vendor has under the contract of sale. *Carey v. Starr*, 93 Tex. 508, 56 S. W. 324; *Douglass v. Blount*, 95 Tex. 369, 67 S. W. 484, 58 L. R. A. 699. This right of rescission is by no means an absolute one, and may be lost or waived in a number of ways; and

> when lost it will not be revived unless to do so is necessary to protect the vendor against a successful repudiation by the vendee of the unsatisfied obligations of the contract under which he holds.

The vendor's lien retained by Ruff in his deed to Pierce gave him two alternative rights upon failure to pay the purchase money—one to foreclose and take a personal judgment for any balance left unpaid after applying the proceeds of the sale to the debt; the other to rescind the contract, and take back the land. No right to either remedy arose unless there was a breach of the contract to pay the purchase price.

Ruff could not rescind without a right to rescind. He could have had no right to rescind without, at least, a breach of the contract to pay the purchase price. No evidence of the failure to pay the purchase money is contained in the record. Therefore no evidence of a right to rescind the contract of sale is shown. Twelve years after the maturity of the notes to secure which the lien was retained he deeded the land to Morrison. This was an exercise of the right of rescission if he had such right. Without the right, the form of its exercise was a nullity.

> The vendor's remedy by rescission is a harsh and stringent one, especially when a part of the consideration has been paid, and it is sought to forfeit the payment and recover or resell the land. Hence slight circumstances are seized upon to protect the vendee against the forfeiture of the amount paid, or compel the vendor to seek redress by a suit for the balance due upon the purchase money.
>
> He must not delay too long in insisting upon payment of the money as it falls due, or he will be considered as having waived the default. *See Scarborough v. Arrant*, 25 Tex. 129. He must not treat the contract as still subsisting, or do any act which may be construed into its affirmance. A transfer of one of the purchase money notes is held to amount to such an affirmance (*Coddington v. Wells*, 59 Tex. 49), and so doubtless is a repurchase of the land from the vendee, at least when more is paid than was due upon the original contract.
>
> If the vendor goes into equity to set aside the sale he must tender the purchase money already received or he will be defeated as not offering to do equity. *Coddington v. Wells*, *supra*; *Thomas v. Beaton*, 25 Tex. Sup. 321. The vendee, when sued for the land, may tender the money due and this will save the forfeiture, no matter how long he may have been in default. *Tom v. Wollhoefer*, 61 Tex. 281.

* * * *

Humphrey-Mexia Co.
v.
Gammon

113 Tex. 247, 254 S.W. 296
(1923)

CURETON, C. J.

This suit was filed in the district court of Limestone county by J. L. Gammon, John F. Wyatt. R. J. Colburn, M. B. Ray, and A. H. Paillett, against Humphreys-Mexia Company, a corporation, C. A. Kennedy, H. W. Freeman, W. D. Freeman, H. C. Freeman, J. E. Winans, J. W. McLendon, Jack Womack, Max Guteman, and the Shear Company, defendants, in the form of trespass to try

title to part of the Pedro Varilla 11-league grant, situated about 1 1/2 miles west of the town of Mexia, in Limestone county.

In the trial court judgment was rendered in favor of the defendants named, except the Shear Company. On appeal, the Court of Civil Appeals reversed and rendered the judgment in favor of the defendants in error here, who were plaintiffs below. 244 S. W. 162. The case is here on writ of error.

Defendants in error owned the land in dispute, except the oil and minerals in the same. C. A. Kennedy was the common source of the title to the whole of the land, including the oil and minerals, and all parties claim under him.

On September 30, 1899, C. A. Kennedy executed and delivered a general warranty deed in the usual form to the land in controversy to F. M. Sanches; the consideration being $1,500, evidenced by five promissory vendor's lien notes, each for the sum of $300, payable as therein specified. The deed, after describing the land by field notes, and preceding the habendum and warranty clauses, contained an exception reading as follows:

> But it is expressly agreed and understood that said C. A. Kennedy reserves all the oil and minerals in said land and he and his heirs assigns and legal representatives shall have the right at all times to enter on the above-described lands and to bore wells and make excavations and to remove all the oil and minerals found thereon.

The deed also contained an express reservation of the vendor's lien to secure the payment of the purchase-money notes.

At the time of the execution of this deed, Kennedy, who was, or had been, a merchant, was indebted to the Rotan Grocery Company, which was crowding him for settlement of his account. A short time after the execution of the deed, Kennedy carried the notes received by him therefor to Mr. Shear, the president of the company, who accepted them and gave him credit on his account therefor. Kennedy states that Mr. Shear "knew full well the reservations in the deed, and he told me it was not worth one cent to me or anybody else." Some three or four months thereafter Kennedy, at the request of the company, and without any additional consideration therefor, executed and delivered a transfer of the notes to the company. This instrument reads as follows:

> The State of Texas, County of Limestone.
>
> Whereas heretofore, to wit, on the 30 day of September, A. D. 1899, F. M. Sanches, made, executed and delivered to C. A. Kennedy his five several promissory notes payable to the order of said C. A. Kennedy as follows: Dated September 30, 1899, due November 1st, respectively, 1900, 1901, 1902, 1903, and 1904, for $300.00 each, bearing 10 per cent. interest per annum from January 1, 1900, with interest on each of said notes at the rate of 10 per cent. per annum and providing for the payment of 10 per cent. additional as attorney's fees upon the contingency therein specified.
>
> And whereas, said notes were given in payment of the purchase money for the following described parcel of land, situated in Limestone county, Tex., viz., being two tracts or parcels land out of the Pedro Varilla Eleven League grant this day sold to F. M. Sanches on September 30, 1899.
>
> And whereas, a vendor's lien is reserved and retained on said land to secure the payment of said notes and each thereof:
>
> Now, therefore, know all men by these presents, that I, the said C. A. Kennedy, for a valuable consideration, have assigned, transferred and delivered said five notes to the Rotan

> Grocery Company and in consideration of the premises and the sum of one dollar to me in hand paid, the receipt of which is hereby acknowledged, have bargained, sold and conveyed, assigned and set over to the said the Rotan Grocery Company my lien on said land and have and do hereby bargain, sell and quitclaim all my right, title, interest, estate, claim and demand, both legal and equitable, in and to said land and every part thereof, together with all and singular the hereditaments and appurtenances thereunto appertaining. To have and to hold unto the said the Rotan Grocery Company successors and assigns and his heirs and assigns forever.
>
> In testimony whereof, witness my hand at Mexia, this 29th day of January, A. D., 1900.
>
> C. A. Kennedy.

On February 24, 1903, Sanches and wife conveyed the land described in the deed to him from Kennedy to the Rotan Grocery Company, the consideration being the cancellation of the notes shown in the deed. This conveyance contained a recitation as follows:

> The land herein conveyed being the same land deeded to F. M. Sanches by C. A. Kennedy by deed recorded in volume 36, page 547. Deed Records of Limestone County, Tex., and this conveyance is subject to the mineral rights reserved in said conveyance.

On March 30, 1905, the Rotan Grocery Company conveyed the land to Mrs. Jasper K. Smith, with the following in the deed:

> This land herein conveyed being the same land deeded to F. M. Sanches by C. A. Kennedy by deed recorded in volume 36, page 547, Deed Records of Limestone County and afterwards conveyed to Rotan Grocery Company by said F. M. Sanches by deed dated February 24, 1903, recorded in deed records of Limestone county and is subject to the mineral rights reserved in said conveyance.

On September 4, 1908, the Rotan Grocery Company released the lien reserved in its deed to Mrs. Jasper K. Smith to secure the purchase-money notes therein described, which release, among other things, recited:

> Said Rotan Grocery Company has no other or further claim against said land or any part thereof.

The word "minerals" is sufficiently broad to include "oil and minerals," the words used in the reservation in Kennedy's deed to Sanches, and for convenience will be used in this opinion as comprehending both oil and minerals.

The plaintiffs in error Humphreys-Mexia Company et al., claim the minerals in the land in controversy under the exception in the deed above described from Kennedy to Sanches.

The defendants in error claim by mesne conveyances solely under Mrs. Jasper K. Smith. The Shear Company, successor to the Rotan Grocery Company, claims that it took title to the minerals by reason of the transfer of the vendor's lien notes to it by Kennedy, set out above.

The Shear Company and the defendants in error both contend that the title to the minerals passed out of Kennedy by virtue of the transfer of the vendor's lien notes heretofore described, and that thereafter when Sanches conveyed the land to the company, the latter had title to not only the surface, but to the minerals as well. Defendants in error, Gammon et al., assert, however, that the deed and release of the purchase-money notes to Mrs. Jasper K. Smith transferred the title to both the minerals and surface to her, and they claim the whole under her. The Shear Company denies this, and insists that the reference to the mineral reservation contained in the Rotan Grocery Company's deed to Mrs. Smith was sufficient to keep the title to the minerals in the company, and

that the release executed by it to her, described above, did not convey the title to the minerals. Plaintiffs in error, the Humphreys-Mexia Company et al., assert that the title to the minerals never passed out of Kennedy by the assignment of the notes executed by the latter.

The contention of defendants in error and the Shear Company is that the transfer of the vendor's lien notes, in the light of a proper construction of the deed to Sanches, conveyed the minerals in the land, as well as transferred the vendor's lien notes, to the Rotan Grocery Company. In view of our conclusion, this is the only question necessary for us to discuss.

It is elementary that the minerals in place may be severed from the remainder of the land by appropriate conveyances. * * * The severance may be made by an exception or reservation in the deed.

* * * *

When the severance is accomplished, each estate, that in the minerals in place, and that in the remainder of the land, may be a freehold, or an estate in fee simple. * * *

We do not understand that these propositions are controverted, but the insistence is that the severance of the minerals in place from the remainder of the land cannot be effected by a general warranty deed in which a vendor's lien is reserved to secure the payment of purchase-money notes-at least until the notes have been paid.

The language of the exception in Kennedy's deed is admittedly sufficient to sever the minerals from the land conveyed, unless this purpose is defeated by the reservation of the vendor's lien to secure the purchase-money notes. Defendants in error's position is definitely stated in their third proposition, as follows:

> The deed from C. A. Kennedy to F. M. Sanches, dated September 30, 1899, having expressly reserved a vendor's lien to secure the payment of the five purchase-money notes, was an executory contract, and the superior title to the land remained in Kennedy until his conveyance became executed by the payment of the notes. The minerals having been reserved in the deed by apt language, the title thereto never passed from Kennedy by the deed, but at all times reposed in him, so that under the doctrine of merger the retention of the superior title to the land, which included the minerals, as well as the surface, precluded the technical severance attempted by the reservation. Therefore, the conveyance of the superior title and of his right, title, interest, estate, claim and demand, both legal and equitable, by the deed and transfer dated January 29, 1900, divested him of any title to the minerals, and vested same in the Rotan Grocery Company.

We will first inquire as to whether or not the deed from Kennedy to Sanches was an executory contract in the sense that it was ineffective to sever the minerals in the land from the remainder.

The opinions of this court have uniformly referred to deeds of the character here involved as executory contracts in which the legal title to the land conveyed remains in the vendor until the purchase-money notes are paid. Counsel for the Shear Company cite *Foster v. Powers*, 64 Tex. 249, *Farmers' Loan Co. v. Beckley*, 93 Tex. 267, 54 S. W. 1027, and *Russell v. Kirkbride*, 62 Tex. 455, in support of the doctrine. Many other cases might have been mentioned. But an examination of the opinions of this court shows that, while the deed here involved is an executory contract as between the vendor and vendee, and those in privity with them, it is so only in the sense that the naked legal title remains in the vendor, to be automatically vested in the vendee upon payment of the purchase money, and that in all other respects, between such parties, and in all respects in so far as strangers to the transaction are concerned, the deed is not executory, but is an executed contract. * * *

In the case of *Carey v. Starr*, 93 Tex. 508, 515, 56 S. W. 324, 325, just cited, this court said:

> From the time it was first announced that the reservation of lien in a deed reserved the superior title to the vendor, there has been a continuous and persistent effort to push it to the limit of executory contracts for the sale of land, but this court has steadily resisted that effort and has uniformly limited the vendor's title to the character of security for the purchase-money debt, and, when the debt has been paid, the title of the vendor ceases. *Ogburn v. Whitlow*, 80 Texas, 241; *Brown v. Montgomery*, 89 Texas, 250. In *Ogburn v. Whitlow*, the vendee sought to defend against the purchase-money notes on the ground that there was a defect in the title to the land and claimed that the deed was an executory contract; but this court said: "While such deeds have been held by this court to be executory for some purposes, we think it should not be so held for all purposes, and that the one now in question should, upon the issue now presented, be treated as an executed contract."
>
> When the purchase money has been paid, the title of the vendee in a deed of the character in question becomes absolute as to the vendor without any action on his part. It is not executory in any sense, except that the title awaits the payment of the purchase money for the land. *Stitzle v. Evans*, 74 Texas, 596; *Russell & Seisfeld v. Kirkbride*, 62 Texas, 455.

This excerpt announces the correct doctrine, from which, as we understand them, there is no dissent in the opinions of this court.

The rule is elementary that-

> A contract may be partly executed and partly executory; and may be executory as to one party and executed as to another. 13 CORPUS JURIS, pp. 245, 246, and cases cited in the notes.

It is this rule which has been applied by this court in dealing with deeds in which vendor's liens have been retained to secure purchase money. Such a deed or contract is executory in the sense that upon default in the payment of the purchase money, the vendor may rescind the trade and sue for the land; but it is an executed contract for all other purposes.

The deed from Kennedy to Sanches not only conveyed the right of possession, use, and profits in the land, but transferred to the latter the equitable title, giving him a title and right of occupancy sufficient to enable him to bring or defend suits in trespass to try title against all the world, except the grantor or those in privity with him. As to all persons except the grantor holding the purchase-money notes, or another to whom he had transferred both the notes and the so-called superior title, such a conveyance was absolute, and vested title. * * *

The vendee under a deed retaining a vendor's lien to secure the purchase money is the "owner" under our statutes authorizing the making of contracts, fixing mechanics', materialmen's, and other liens. *Security Mortgage & Trust Co. v. Caruthers*, 11 Tex. Civ. App. 430, 32 S. W. 837, 841. Such a vendee not only acquires the right to possession, rents and profits, but the right to incumber, sell, and transfer the property, subject only to the payment of the purchase money, and to damages for injuries to his land. *Gilbough v. Runge*, 99 Tex. 539, 91 S. W. 566, 122 Am. St. Rep. 659; *Tom v. Wollhoefer*, 61 Tex. 277; *Denison & P. S. Ry. Co. v. O'Malley*, 18 Tex. Civ. App. 200, 45 S. W. 225. The vendee in such a deed is the entire, sole, and unconditional "owner" of the property within the meaning of these terms as used in a fire insurance policy. *Liverpool, etc., Ins. Co. v. Ricker*, 10 Tex. Civ. App. 264, 31 S. W. 248; *Hamburg-Bremen Ins. Co. v. Ruddell*, 37 Tex. Civ. App. 30, 82 S. W. 827; *Wright v. Hartford Fire Ins. Co.*, 54 Tex. Civ. App. 6, 118 S. W. 192. The land of such a vendee is subject to execution and the laws of descent and distribution. *Miner v. Burnett*, 90 Tex. 245, 249, 38 S. W. 350.

On the other hand, the bare legal title held by the vendor after the transfer of the purchase-money notes is an insufficient defense against a suit in ejectment brought by the purchase. *Roy v. Clarke*, 75 Tex. 28, 12 S. W. 845. Nor could the holder of such a title maintain a suit for the land. *Raley v. D. Sullivan & Co.* (Tex. Com. App.) 207 S. W. 906. The title of the vendor under such conditions is not subject to attachment or execution. *Ross v. Bailey* (Tex. Civ. App.) 143 S. W. 961, 963; *Traders' National Bank v. Price* (Tex. Com. App.) 228 S. W. 160; *Rutherford v. Mothershed*, 42 Tex. Civ. App. 360, 92 S. W. 1021; *Willis v. Sommerville*, 3 Tex. Civ. App. 509, 22 S. W. 782. And although the naked legal title of the vendor, who has disposed of the purchase-money notes, on his death may pass to his heirs, they take no beneficial interest therein, but receive and hold it in trust, for the holder of the notes. *Atteberry v. Burnett*, 102 Tex. 118, 122, 113 S. W. 526.

The contract is so completely an executed one that the courts hold that the vendor, although holding, as between himself and his vendee, the superior title, cannot maintain a suit in trespass to try title against one claiming adversely to his vendee. *State v. Dayton Lumber Co.*, 106 Tex. 41, 155 S. W. 1178; *Stephens v. Motl*, 82 Tex. 81, 18 S. W. 99. His right, at most, as to others than his vendee, is that of a mortgagee out of possession. *Carey v. Starr*, 93 Tex. 508, 56 S. W. 324; *Stephens v. Motl*, 82 Tex. 81, 18 S. W. 99.

A consideration of the cases cited shows conclusively that the deed from Kennedy to Sanches was an executed contract for all purposes, except to defeat the payment of the purchase-money notes. For that purpose it was executory, in so far as the right of rescission existed in favor of Kennedy. But in so far as Kennedy's action was concerned, the contract was completely executed. Nothing remained for him to do. He had signed, acknowledged, and delivered the only conveyance which the law or the contract required of him, or made necessary for him to execute. Upon the payment of the purchase money, the legal title to the land held by Kennedy would, *ipso facto*, vest in Sanches. *Burnett v. Atterberry*, 105 Tex. 119, 125, 145 S. W. 582; *Russell v. Kirkbride*, 62 Tex. 455.

Since the contract, in so far as any act on the part of the vendor was concerned, was complete, it follows that every constituent element thereof, every act devolving upon him to perform, including the severance of the minerals in place from the remainder of the land, had been performed and was fully executed.

Shortly after the execution of the deed to Sanches, Kennedy indorsed and delivered the purchase-money notes to the Rotan Grocery Company. This gave that company the right to sue on the notes, foreclose the vendor's lien reserved to secure the same, but did not transfer the legal title, also held by Kennedy, to secure the payment thereof. *Hamblen v. Folts*, 70 Tex. 132, 135, 7 S. W. 834; 17, MICHIE'S DIGEST OF TEXAS REPTS. pp. 255, 258.

However, thereafter Kennedy had no beneficial interest in the legal title to the land conveyed to Sanches, and held it in trust as a naked trustee for the benefit of the holder of the notes and for the vendee.

* * * *

By analogy, as well as under the general rules of construction, we may say that where it is the intention of the parties to a conveyance of land to separate the title in fee to the minerals in place from the title in fee to the remainder of the land, effect will be given to this intention.

This was Kennedy's status when called upon to execute the assignment of the vendor's lien notes in evidence. He was the holder of the fee-simple title to the minerals in place, severed from the remainder of the land, and to the latter he held the naked legal title as trustee, without any

beneficial interest whatever. An examination of the assignment of the vendor's lien notes, quoted above, leaves no doubt as to which of the titles or estates he conveyed to the Rotan Grocery Company. This assignment has been quoted. As a matter of inducement, explanatory of the occasion and purpose of the instrument, it refers to the execution of the vendor's lien notes heretofore described, secured by the lien on "two tracts or parcels of land out of the Pedro Varilla 11-league grant this day sold to F. M. Sanches on September 30, 1899," which, as we have seen, did not embrace the minerals in place. * * *

In the transfer of the vendor's lien notes before us the words "said land" in each instance necessarily refer to the land previously designated as that conveyed by Kennedy to Sanches on September 30, 1899. This reference is plainly to the deed from Kennedy to Sanches by which the notes were created and the lien retained, and the assignment must be construed in connection with that deed. * * * Therefore the general words in the assignment describing the land are necessarily limited to the land conveyed to Sanches, which did not embrace the minerals in place.

The only "right, title, interest, estate, claim and demand, both legal and equitable, in and to said land and every part thereof," which Kennedy had in "said land" at the time he executed the assignment of the vendor's lien notes, was the naked legal title held in trust to secure the payment of the notes previously transferred to the Rotan Grocery Company, and this was the only title conveyed by the instrument.

A further discussion of the question is unnecessary. It is clear to us that the assignment of the vendor's lien notes, executed by Kennedy, when construed in connection with the deed, conveyed to the Rotan Grocery Company only the notes, the lien reserved to secure them, and the naked legal title retained by Kennedy for the same purpose; and did not convey the minerals in place excepted in the Sanches deed, and held by Kennedy in fee. This is the common sense construction, and in our opinion produces the result contemplated by, and effectuates the intention of, the parties to the instrument.

* * * *

From the foregoing it follows that the judgment of the Court of Civil Appeals must be reversed in so far as it changed or modified the decree of the trial court, and judgment here rendered in all things affirming the judgment of the district court; and it is so ordered.

Notes

1. "Whatever may be the character of the title remaining in a vendor (superior title) who reserves in his deed a lien for any part of the purchase price, it has been clear that he retains no interest in the land which would be subject to sale under execution." *Traders' Nat'l Bank v. Price*, 228 S.W. 160, 163 (Tex. Comm'n App. 1921, judgm't adopted). Thus, neither the superior title retained by the vendor, or the vendor's lien itself are subject to attachment, levy of execution or other creditor remedies. *See id.* However, the interest of the vendee under a deed reserving an express vendor's lien is subject to execution by her creditors. *See Minter v. Burnett*, 90 Tex. 245, 249, 38 S.W. 350, 353 (1896).

2. The owner of property which is subject to an express vendor's lien insures it under a policy stipulating that the company shall not be liable for loss "if the interest of the insured be other than unconditional and sole ownership, or if the subject of the insurance be a building on ground not owned by the insured in fee simple." If the property is damaged, the carrier is still liable under the policy as the language has reference only to the quality of the title, and not to liens and en-

cumbrances on the property. *Alamo Fire Ins. Co. Lancaster*, 28 S.W. 126, 127 (San Antonio 1894, writ ref'd).

3. An executory contract for conveyance conveys neither legal nor equitable title. *See Johnson v. Wood*, 138 Tex. 106, 110, 157 S.W.2d 146, 148 (1951) (holding that until the contract was fully performed, the vendee only has an equitable right in the property that ripens into equitable title upon payment of the purchase price); *Currie v. Burgess*, 132 Tex. 104, 120 S.W.2d 788, 790 (1938) (noting that such a contract is merely an executory contract to convey and not a contract for sale). *See* TEX. PROP. CODE ANN. 5.061, et seq. (West 2004 & Supp. 2013) (containing the various statutory provisions relating to executory contracts for conveyance). The interest of a vendor under an executory contract for conveyance is subject to execution by the vendor's creditors as the vendor is still the legal and record title owner of the property. *See Pevehouse v. Oliver Farm Equip. Sales, Co.*, 114 S.W.2d 658, 662 (Tex. Civ. App.—Amarillo 1938, writ dism'd). Furthermore, in *Lyon v. McBride*, 62 Tex. 309, 312 (1884), and after it, in *Matula v. Lane*, 56 S.W. 112, 113 (Austin 1900, no writ), it has been held that the interest of a vendee in an executory contract for the sale of land who had paid part of the purchase price and gone into possession is subject to sale under execution.

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3. Impairment of Security

Another limitation imposed upon the mortgagee under the Texas lien theory of mortgages is that the mortgagee cannot bring an action against the mortgagor for damages to the property. The mortgagee's cause of action is solely for injury to his or her security. The same result applies in the event that the property is taken through eminent domain proceedings.

Carroll
v.
Edmondson

41 S.W.2d 64
(Tex. Comm'n App. 1931, judgm't adopted)

CRITZ, J.

* * * *

One W. T. Pittman was the owner of four lots of land in the city of Waxahachie, Ellis county, Tex., on which was situated a two-story brick business house, and in this house was located an elevator so constructed and installed in the building as to constitute it a part of the realty. Ralph Carroll, the plaintiff in error, held notes aggregating, exclusive of interest and attorney's fees, the sum of $10,000, secured by deed of trust liens against the above premises and improvements. The above notes were defaulted on, and Carroll filed suit against Pittman and several other parties to recover a personal judgment on his notes, and foreclose his liens on the mortgaged premises and improvements. This suit was prosecuted to final judgment, the property sold under order of sale, and bought in by Carroll for $249.80, leaving more than $11,000 unpaid on the debt.

Prior to the filing of the above foreclosure suit, H. Edmondson, the defendant in error here, purchased from Pittman the elevator above mentioned, removed same from the building, and appropriated it to his own use. Also, the sale of the elevator to Edmondson was made without the knowledge or consent of Carroll, and none of the consideration paid therefor was received by him. Edmondson was never made a party to the foreclosure suit.

Subsequent to the judgment of foreclosure, but prior to the sale under the order of sale issued thereon, the present suit was instituted in the district court of Tarrant county, Tex., by Carroll against Pittman and Edmondson. The trial was had on amended and supplemental petitions, which sought recovery from Edmondson for the value of the elevator. Under these pleadings, the facts above stated were fully pleaded.

The case was tried in the district court with a jury. In answer to a question submitting that issue, the jury found the elevator was worth $1,250 on the date it was removed from the building. Based on such answer, the district court rendered judgment in favor of Carroll and against Edmondson for $1,250, and also rendered judgment for Edmondson over against Carroll for a like amount. Edmondson appealed from the above judgment to the Court of Civil Appeals for the Second district at Fort Worth, which court reversed the judgment of the district court and remanded the case for a new trial. The case is in the Supreme Court on writ of error granted on application of Carroll.

On the trial of the case in the district court, the defendant, Edmondson, offered testimony to the effect that the market value of the lots with the improvements thereon, after the elevator had been removed therefrom, was $20,000. That testimony was excluded upon objections of the plaintiff, Carroll.

The Court of Civil Appeals held that the exclusion of the above testimony was error, and this holding is assigned as error here.

We are of the opinion that the trial court erred in refusing to admit the above testimony, and that the Court of Civil Appeals was correct in so holding.

It is the law of this state that a mortgagee of land is not the owner thereof, nor is he entitled to possession. A mortgage of real property is not regarded as a common law conveyance on condition, but merely as security for debt, the legal estate existing only for that purpose. *Carey v. Starr*, 93 Tex. 508, 56 S. W. 324; *Schalk v. Kingsley*, 42 N.J. Law, 32. It would therefore follow that in an action by the holder of a lien on real property against one who has injured the mortgaged property, the lien holder would have no cause of action for damages to the property, but the injury to the security is the measure of his recovery. *Carey v. Starr*, *supra*; *Schalk v. Kingsley*, *supra*.

In the *Carey* Case, *supra*, our Supreme Court, speaking through Judge Brown, cites *Schalk v. Kingsley*, *supra*, and expressly approves and adopts the rule there announced. In the *Schalk* Case, the rule is clearly laid down by the Supreme Court of New Jersey that the mortgage is not regarded as a common-law conveyance on condition, but merely as security for debt, and that the measure of damages is not based upon the injury to the mortgaged premises, but upon the loss occasioned to the holder of the lien by the injury to his security. We quote the following from the opinion in the *Schalk* Case:

> It would seem to be in consonance with legal principles to hold that this action in this state must be based not upon the injury to the mortgaged premises, but upon the loss occasioned to the plaintiff by the partial destruction of his security, and that the extent of such loss must measure his damages.

It follows that in the case at bar the measure of Carroll's damage for the wrongful removal of the elevator in question is not the market value of the elevator itself, but the injury done to Carroll's mortgage by such removal, and if the property as left was of sufficient value to secure the debt, then Carroll has suffered no injury.

From what we have said, it is evident that a finding by the jury as to the market value of the elevator can form no basis whatever for a judgment for Carroll. The finding would have to be as to the difference in the value of the mortgaged premises before and after the removal of the elevator; that is, the jury should find the value of the premises before the elevator was removed, and the value after such removal. In the present case, such difference would be the damage to the security if the security left be insufficient to secure the debt. Of course, if the jury finds the value of the premises with the elevator removed equal to or more than the mortgaged debt, no injury whatever has resulted, and the verdict would be for Edmondson.

It seems to be contended by Carroll that, since the mortgaged property with the elevator removed sold under order of sale in the former suit for less than the debt thereby secured, he is entitled to recover from Edmondson the value of the elevator, not exceeding the amount unpaid on the judgment. This contention is untenable. Edmondson was not a party to the judgment of foreclosure or any other proceeding had thereunder, and is therefore not bound by such judgment or sale price, as he would have been had he been made a party to that suit. It is the settled law of this state that judgments are conclusive between the parties and their privies only. *Bertrand v. Bingham*, 13 Tex. 266. Edmondson was undoubtedly guilty of a wrongful act towards Carroll if he injured his security; that is, if he injured the mortgaged property so as to impair the mortgage; but not being a party to the original foreclosure action, he is not bound by the sale price of the premises in that proceeding. *Paddock v. Williamson*, 9 S.W.(2d) 452, 454 (Tex. Civ. App. Writ Ref.).

* * * *

It follows from what we have said that, since Edmondson was not made a party to the original foreclosure proceedings, and did not purchase and remove the elevator in question pendente lite, he is not bound by such foreclosure proceedings, and is entitled to show the value of such premises after the elevator was removed. It also follows that if the property as left was of a value equal to or more than Carroll's debt, he has suffered no injury.

We recommend that the judgment of the Court of Civil Appeals, which reverses the judgment of the trial court and remands the cause for a new trial, be affirmed.

CURETON, C. J.

The judgment of the Court of Civil Appeals, reversing that of the district court, is affirmed, as recommended by the Commission of Appeals.

Buell Realty Note Collection Trust
v.
Cent. Oaks Inv. Co.

483 S.W.2d 24
(Tex. Civ. App.—Dallas 1972, writ ref'd n.r.e.)

BATEMAN, J.

The question here is whether the owner or mortgagee is entitled to money paid as compensation for land condemned for public use. Appellees were the owners of a tract containing 114,019 square feet, which they had purchased for $735,000, of which $185,000 was paid in cash. Appellant holds a vendor's lien note for the balance of $550,000, due in April, 1974. The City of Dallas condemned 10,793 square feet for which it paid $140,000 into the registry of the county court. The controversy was submitted to the district court, and at the conclusion of a nonjury trial the court awarded the entire amount to appellees. Findings of fact and conclusions of law were filed, as follows:

1. The market value of the 114,019 square feet of land and improvements, immediately before the taking on July 1, 1971, was $15 .00 per square foot, or $1,710,285.00.

2. The market value of the 103,226 square feet of land and improvements, immediately after the taking on July 1, 1971, was $15.00 per square foot or $1,548,390.00.

3. The security interest of the Defendant, Buell Realty Note Collection Trust has not been impaired.

* * * *

Appellant's third point of error raises the key issue in the case which, as stated, is as to which of the parties under the law is entitled to recover the compensation paid. The prevailing view is that where the entire mortgaged property is taken, the full amount of the condemnation proceeds should be allocated to the mortgagee, to the extent of the mortgage debt. 27 AM.JUR.2D, *Eminent Domain*, § 257, p. 36. A more difficult question is presented, however, when only a part of the mortgaged property is taken. There is considerable disagreement among the decisions. Different and somewhat inconsistent approaches are made by the courts to announce a rule which will protect the interest of the mortgagee while treating the mortgagor fairly. 29A C.J.S. *Eminent Domain* §§ 200-202, pp. 890-913.

According to one view, where there is a partial taking the mortgagee is entitled to receive all of the award to the extent of the mortgage debt, the amount received, of course, being credited on the mortgage debt. The leading case utilizing this approach is *City of Chicago v. Salinger*, 384 Ill. 515, 52 N.E.2d 184, 154 A.L.R. 1104 (1943).

Another approach is that where only part of the land is taken the mortgagee is entitled to receive only so much of the award as will compensate him for the impairment of his security. *Seaboard All-Fla. Ry. v. Leavitt*, 105 Fla. 600, 141 So. 886 (1932); *Swanson v. United States*, 156 F.2d 442, 170 A.L.R. 258 (9th Cir. 1946; *cert. den*. *Spokane Portland Cement Co. v. Swanson*, 329 U.S. 800, 67 S.Ct. 492, 91 L.Ed. 684 (1947)); *Mahoning Nat. Bank v. City of Youngstown*, 143 Ohio St. 523, 56 N.E.2d 218, 224 (1944). The trial court followed this impairment-of-security theory and, concluding that appellant's security interest had not been impaired, allocated the entire amount to appellees. We affirm.

Neither of these methods of apportioning the award is entirely satisfactory. The one deprives the owner of the benefit of his bargain in that, contrary to his contract, the maturity of at least a

part of his indebtedness is accelerated, even though he is not in default. The other deprives the mortgagee of the benefit of his bargain in that his contract is for a lien on the entire tract and if he is not given the compensation paid for the part condemned he has lost a valuable right affecting the marketability of the mortgage debt unless he discounts it substantially, and forces him to take an uncompensated risk of a catastrophic depression of land values by the time his note matures.

> In any event, the greatly prevailing view is that where mortgaged land is taken or damaged for a public use, the mortgagee is entitled either to the entire award or to so much thereof as is necessary to compensate him for his interest or damage. Accordingly, where the whole of the mortgaged land is taken in eminent domain proceedings, the mortgagee is entitled to all of the award or so much of it as is necessary to satisfy the mortgage indebtedness. Where only a part of mortgaged property is taken, the mortgagee is entitled, generally speaking to only so much of the award as is necessary to compensate him for his interest in the part taken, although the view has been expressed that the mortgagee is also entitled to so much of the damages as might be necessary to satisfy his claim on the part of the mortgaged property not taken if it should prove insufficient for that purpose. 27 AM.JUR.2D, *Eminent Domain*, § 257, p. 36.
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> * * * *

Each case must be considered in the light of its own facts and surrounding circumstances. Whether the security has been or will be impaired or damaged is a fact issue to be resolved in each case by the triers of the facts, taking into consideration all the surrounding circumstances including, but not necessarily limited to, the fact question of whether after the taking or damage the value of the remaining property has (and probably will continue to have until the maturity of the secured debt) substantially the same ratio to the debt as the value of the mortgaged property bore to the debt at the time of its creation, or at least a value sufficiently in excess of the debt to give reasonable assurance that the debt will be paid at or before maturity. This places a rather heavy burden on the trial court, but it is in our opinion necessary to the balancing of the equities between parties who have, through no fault of their own, suffered an involuntary, substantial change in their property rights. We do not think the trial court in carrying that burden should be restricted or inhibited by an unyielding rule that in all cases of partial taking the compensation should go either to the mortgagee or the owner.

In this case the trial court found that appellant's security interest has not been impaired, and appellant does not question the sufficiency of the evidence to support that finding. Under these circumstances and the entire record before us, we cannot say that the judgment is erroneous.

Appellant also argues that until the vendor's lien note is paid its title as vendor is superior in the sense that appellees cannot assert their title against the vendor unless and until the purchase money has been paid, and that this in effect is what they are doing in contesting appellant's claim to the award, citing *Collins v. Republic Nat. Bank of Dallas*, 152 Tex. 392, 258 S.W.2d 305 (1953), and *State v. Forest Lawn Lot Owners Ass'n*, 152 Tex. 41, 254 S.W.2d 87 (1953). We do not agree with appellant. It is not necessary to deny the superior title of the holder of the vendor's lien also to recognize that, as held in Stephens v. Motl, 82 Tex. 81, 18 S.W. 99, quoted in *Carey v. Starr*, 93 Tex. 50, 56 S.W. 324, 325 (1900), he is "in the relation of mortgagee of the land out of possession, and not entitled to possession until default on part of the vendee, and a rescission by him of the contract, or a foreclosure."

In determining the relative rights of the parties to the fund in question we must treat the deed conveying the land to appellees as an executed contract, and not executory, despite appellant's vendor's lien and concomitant "superior title." Appellees were given the exclusive right to use,

enjoy and occupy the land and, in short, to have the benefit of all the elements of ownership, subject only to appellant's rights to rescind or to foreclose upon default of payment of the purchase money note. * * *

Affirmed.

Note

In refusing the writ of error because it found no reversible error, the Supreme Court stated:

> Petitioner insists that the entire award should be paid to it and applied on the mortgage debt. We are satisfied that it is not entitled to that relief under the facts of the case. There is no contention that the proceeds of the award should be allocated to the parties on the basis of a mathematical formula that will preserve some established relationship between the indebtedness and the property securing its payment, and we have made no attempt to determine whether such a rule might be appropriate in cases of this nature.

Buell Realty Note Collection Trust v. Cent. Oaks Inv. Co., 486 S.W.2d 87, 87 (Tex. 1972).
