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provided that the laws of the Republic continued as effective after statehood until they expired or were altered or repealed.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