(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.