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Mortgages—Distinction Between Mortgage and Security Deed— Subjection of Interests to Execution.

In a recent Georgia case, *X* as security for a loan, executed to *Y* a deed absolute in form. *Y* gave his bond, binding himself to reconvey upon payment of the debt. A creditor of *X* sought to levy an execution on the property. In affirming a judgment in *Y*'s favor, the court said, "A security deed conveys absolute title, and leaves the grantor no interest in the land which can be subjected to levy and sale by a creditor whose judgment was obtained after the deed was executed."¹

In Georgia, two types of security instruments are in common use. Besides mortgages—instruments containing a defeasance clause, describing the debt, and showing their purpose to be security—there are deeds conveying absolute title for the purpose of security, but accompanied by a separate bond for reconveyance. Where a mortgage is used, the common law rule that legal title passes to the mortgagee is not followed. Instead, legal title is held to remain in the mortgagor, and a mere lien in favor of the mortgagee is created. As a consequence, the Georgia court finds the mortgagor has such an interest as can be sold under execution, the purchaser taking the property subject to the lien of the mortgagee.² The mortgagee's lien is no doubt beyond the reach of an execution.³

In North Carolina a mortgage vests legal title in the mortgagee, a right of redemption remaining in the mortgagor.⁴ Until made so by statute in 1812, this right of redemption was not subject to sale under execution.⁵ The mortgagee's legal title is not an interest which can be levied upon.⁶

Thus, although the right of redemption remaining after legal title

¹ *Smith v. Borders*, 156 S. E. 690 (Ga. 1931).

² *Davis v. Anderson*, 1 Ga. 176 (1846); *Sims v. Jones*, 158 Ga. 384, 123 S. E. 614 (1924); GA. ANN. CODE (Michie, 1926) §3256. See *Sturges and Clark, Legal Theory and Real Property Mortgages* (1927) 37 YALE L. J. 691.

³ *Missouri Real Estate & Loan Co. v. Gibson*, 282 Mo. 75, 220 S. W. 675 (1920).

⁴ *Stevens v. Turlington*, 186 N. C. 191, 119 S. E. 210 (1923); McINTOSH, N. C. PRACTICE AND PROCEDURE (1929) §725 (4).

⁵ *Allison v. Gregory & Sons*, 5 N. C. 333 (1809); N. C. ANN. CODE (Michie, 1927) §677 (equitable and legal rights of redemption in real or personal property pledged or mortgaged made subject to levy and sale under execution). A second equity of redemption, however, is outside this statute, and not subject to levy. *Thompson v. Parker*, 55 N. C. 475 (1856) (*A* held certificate for land from state; mortgaged this equity to *B*; the remaining equity in *A* held not subject).

⁶ *Stevens v. Turlington*, *supra* note 4.

has been vested in another for security is still not subject to levy in Georgia,⁷ judgment creditors in the two states appear to be in the same position when the property levied upon is mortgaged either by or to their debtors.

An absolute deed coupled with bond for title, as in the instant case, is apparently more frequently used in Georgia security transactions than a mortgage.⁸ When this means of security is used, legal title passes to the creditor.⁹ Until a change was made in the recording statutes, the conveyance did not have to be recorded to defeat a subsequent judgment lien, the instrument not being a "mortgage" within the original act.¹⁰ Though the debtor-grantor has an interest which he can sell¹¹ or mortgage,¹² he does not have an interest which can be levied upon.¹³ However, there does not have to be a reconveyance to the debtor to restore such an interest to him; mere payment of the debt is sufficient.¹⁴ The interest of a grantee in a security deed, unlike that of a mortgagee in either Georgia or North Carolina, can be sold under execution.¹⁵

The security deed is a "higher and better security" than a mortgage.¹⁶ In *Bennett Lumber Co. v. Martin*¹⁷ some of its advantages are pointed out: The grantee's security title is superior to the right of the debtor's wife to dower and the right of his family to a year's support; no homestead can be set aside; unrecorded materialmen's liens are cut off. Also, the grantee in a security deed is entitled to

⁷ *Robinson v. Clifton*, 36 Ga. App. 188, 136 S. E. 90 (1926).

⁸ GA. ANN. CODE (Michie, 1926) §3306 is statutory recognition of this device.

⁹ *West v. Bennett*, 59 Ga. 507 (1877); note 8, *supra*.

¹⁰ *Gibson v. Hough & Sons*, 60 Ga. 588 (1878). GA. ANN. CODE (Michie, 1926) §3307 now provides that such deeds are postponed to all liens obtained prior to recordation.

¹¹ *Williams v. Foy Mfg. Co.*, 111 Ga. 856, 36 S. E. 927 (1900).

¹² *Citizens Bank of Moultrie v. Taylor*, 155 Ga. 416, 117 S. E. 247 (1923) (upon cancellation of security deed, title reverts in debtor; inures to benefit of mortgagee). Where after subsequent mortgage has been given, the bond for title has been transferred to another creditor, both these claims must be paid before the mortgage can attach. *Wood v. Dozier*, 142 Ga. 538, 83 S. E. 133 (1914). But if judgments intervene between execution of the security deed and transfer of bond for title, judgment creditors have claim to residue of proceeds superior to that of transferee of bond for title. *O'Connor v. Georgia R. Bank*, 121 Ga. 88, 48 S. E. 716 (1904).

¹³ *Moss v. Stokely*, 107 Ga. 233, 33 S. E. 61 (1899) and authorities cited by the court in the instant case.

¹⁴ *Citizens Mercantile Co. v. Easom*, 158 Ga. 604, 123 S. E. 883 (1924).

¹⁵ *Parrott v. Baker*, 82 Ga. 364, 9 S. E. 1063 (1889); *Duke v. Ayers*, 163 Ga. 444, 136 S. E. 410 (1927).

¹⁶ *Bleckley, J.*, in *Gibson v. Hough & Sons*, *supra* note 10, at 589.

¹⁷ 132 Ga. 491, 64 S. E. 484 (1909).

possession after default,¹⁸ while a mortgagee is not.¹⁹ In respect to foreclosure there seems no advantage, it being accomplished by this novel method: the grantee reduces his claim to judgment, reconveys the property to the grantor, and then levies an execution on it.²⁰ The reconveyance puts title in the debtor only for the purpose of levy and sale, and except for such purpose is declared to be a "mere escrow." Liens of third parties therefore do not attach.²¹

This "strange device," the security deed, is peculiar to Georgia.²² It is apparently an anachronism. One of the early common law forms of security was a conveyance in fee, the creditor promising to reconvey upon payment of the debt,²³ and the security deed seems a modern adaptation of this ancient expedient. While elsewhere the mortgage and deed of trust have overshadowed other security plants, in Georgia the security deed has flourished; and due to its peculiar attributes, it will no doubt continue to hold its place in the sun.²⁴

HUGH L. LOBDELL.

Public Utilities—Regulation of Contracts With Holding and Affiliated Corporations.

In establishing a rate base for a local public utility, can a state public service commission demand a statement of the cost to the associated foreign corporation in each case: (1) of services to a local public utility rendered by a foreign holding company under a "service and management" contract; (2) of equipment sold to a local public utility by an affiliated foreign corporation? These two problems were raised and answered in the affirmative by the Supreme Court of the United States in the case of *Smith v. Illinois Bell Telephone Co.*¹ All contracts entered into by a public utility must be fair

¹⁸ *Thaxton v. Roberts*, 66 Ga. 704 (1881).

¹⁹ *Elfe v. Cole*, 26 Ga. 197 (1858).

²⁰ GA. ANN. CODE (Michie, 1926) §6037.

²¹ *Carlton v. Reeves*, 157 Ga. 602, 122 S. E. 320 (1924).

²² 1 JONES, MORTGAGES (8th ed. 1928) §354.

²³ 3 HOLDSWORTH, HISTORY OF ENGLISH LAW (3rd ed. 1923) 129.

²⁴ The security deed is impracticable in North Carolina. An absolute conveyance intended merely as security is held void as to creditors, the decisions being placed on the recording statutes. *Holcombe v. Ray*, 23 N. C. 340 (1840); *Gulley v. Macy*, 84 N. C. 434 (1881).

¹ 282 U. S. 133, 51 Sup. Ct. 65, 75 L. ed. 99 (1930). The chronological history of this case is interesting in that after seven years litigation the case was remanded for a new trial. See *Smith et al. v. Illinois Bell Teleph. Co.*, 269 U. S. 531, 46 Sup. Ct. 22, 70 L. ed. 297 (1925) (restraining order affirmed); *Moynihan et al. (City of Chicago, Intervenor) v. Illinois Bell Teleph. Co.*, 38 F. (2d) 77 (N. D. Ill. 1930) (permanent injunction granted because commis-