STATE, USE OF ASHLEY & WATKINS *vs.* LAWSON ET AL.

The right of a mortgagor to redeem his estate, is liable to be taken upon execution by his judgment creditors.

The equity of redemption is considered to be the real and beneficial estate, tantamount to the fee at law, and is accordingly held to be descendable by inheritance, devisable by will, and alienable by deed, precisely as if it were an estate of inheritance at law.

The estate of a mortgage before foreclosure, or, at least, before entry, is not the subject of execution, not even though there has been a default, and the condition of the mortgage forfeited.

Any one may redeem upon whom the equity of redemption is cast, either by the act of the parties or operation of law.

If, in attempting to create a trust, for the use of a third person, all the rights and estate be reserved to the grantor, that are reserved in a mortgage proper, the fee in the land will remain in the grantor to the same extent that it would, had the attempt only been to secure a debt or interest to a third person by mortgage and in such case the right of redemption remaining in the grantor is subject to execution.

Thus, W. conveyed land to G. in trust, to secure the payment of a debt to J. with a power of sale in case he failed to pay the debt, but the deed to be void upon payment by him—held that W. had the same right to redeem that he would have had in case of ordinary mortgage, and that his right of redemption was subject to execution.

Where land is devised in trust, merely subjecting it to the payment of debts, will not vest legal estate in the trustee.

Writ of error to the circuit court of Pulaski county.

THIS was an action of debt upon the official bond of a sheriff, determined in the circuit court of Pulaski county, at the May term, 1884, before the Hon. J. C. P. TOLLISON, special judge. The suit was brought in the name of the State, for the use of Ashley & Watkins, against Lawson, the principal in the bond, and Anthony, De Baun, and Thorn, his securities.

The declaration alleged, as a breach of the bond, that, on the 5th of May, 1842, Ashley & Watkins obtained a judgment, in the circuit court of Pulaski county, against G. W. Whitaker. That, on the 8th June, 1842, they took out a *fieri facias* upon the judgment, and placed it in the hands of Lawson, as sheriff of Pulaski

county, for execution. That they directed him to seize and levy upon a certain lot of ground, situated in the city of Little Rock, as the property of Whitaker, and that he neglected and refused to do so, &c. The pleadings, and judgment of the court below, are sufficiently stated in the opinion of this court.

WATKINS & CURRAN, for the plaintiff. Whitaker had the same interest in the land under this conveyance that he would have had, if it had been drawn in the form of an ordinary mortgage. Indeed, this conveyance, although called a deed of trust, is but a mortgage with a power of sale. 1 *Mod. ch. p.* 514. *Clay vs. Shape,* 18 *Ves. Rep.* 346. *Sugden on Ven. & Pur., in appendix last Ed. p.* 20. *Cocke vs. Morgan,* 18 *Vesey,* 344. 1 *Caines C. p.* 1. 5 *John. Ch. Rep.* 35. *Jackson vs. Henry,* 10 *John. Rep.* 185. *Conway's Ex'r vs. Alexander,* 7 *Cranch* 218. 2 *Story's Equity,* 298.

By statutory enactment, any estate in lands, tenements, or hereditaments, whether equitable or legal, is bound by judgment, and may be sold under execution in this State. See *Rev. St. p.* 386, *sec.* 74, *ib. p.* 481, *sec.* 34, which is certainly sufficiently broad to include every interest in lands: in fact, no language could make it more comprehensive than it is.

At the time the execution was in the hands of the sheriff, Whitaker had such an interest as was subject to sale under execution. 1 *Hilliard Abr.* 285, *sec.* 9, *ib.* 298. *Jackson vs. Willard,* 4 *John. Rep.* 43. *Runyan vs. Mersereau,* 11 *J. R.* 534. *Huntington vs. Smith,* 4 *Conn. Rep.* 235. *Willington vs. Sale,* 7 *Mass. Rep.* 138. *McCall vs. Lenox,* 9 *Serg. & Rawle,* 302. *Ford vs. Philpot,* 5 *Harr. & John.* 312. *Wilson vs, Troup,* 2 *Cowen Rep.* 195. *Eaton vs. Whiting,* 3 *Pick. Rep.* 484. *Blaney vs. Bearce,* 3 *Greenl.* 132. *Williams vs. Amony,* 14 *Mass. Rep.* 20. *Brown vs. Morrison & Sullivan,* 5 *Ark. Rep.* 217.

It was formerly held that the legal title was in the mortgagor, but this rule has been gradually relaxed until the doctrine is now well established, both in England and America, that the mortgagee has a mere chattel interest, or chose in action, and that the mortgagor has not a mere right, but an estate in the land, which may

descend, be conveyed, devised, entailed, mortgaged, and sold under execution, and before foreclosure the mortgagor is regarded as the real owner and a freeholder with the civil and political rights belonging to that character. *The King vs. St. Michaels, Dougl. Rep.* 630. *The King vs. Eddington,* 1 *East's Rep.* 288. 4 *Kent's Com.* 160. *Clark vs. Beach,* 6 *Conn. Rep.* 142. 1 *Chit.* 141. 1 *Hilliard's Abr.* 284, *ib.* 298, 2 *Cruise* 113. 1 *Atk.* 603.

It is shown by the cases above cited that Johnson, the creditor, had, in effect, but a chattel interest. Goodrich, the trustee, did not take a beneficial interest: this conveyance only conferred on him a naked power without any interest. (2 *Hilliard's Abr. p.* 544 *and the authorities there cited.* 4 *J. J. Marshall* 598.) If then the fee did not pass to either Johnson or Goodrich the question is settled. Where lands are conveyed in trust, merely subjecting them to the payment of debts will not vest the legal estate in the trustee." 1 *Hilliard's Abr. p.* 206, *sec.* 34.

PIKE & BALDWIN, contra. The statute on executions. which subjects to execution all real estate, whereof the defendant or *any person for his use* is seized in law or equity, follows a branch of the English statute of frauds, and relates only to those fraudulent and covenous trusts, in which the *cestui que use* has the whole real, beneficial interest, and the trustee, only the naked, formal, legal title. And a judgment at law is no lien on a mere equitable interest in land; and a sale under it will not pass an interest which a court of law cannot protect and enforce. *Rogart vs. Perry,* 1 *J. C. R.* 52 *S. C.* 17 *J. R.* 350. *Forth vs. The Duke of Norfolk,* 4 *Maddox* 504. *Lynch vs. Utica Ins. Co.,* 18 *Wend.* 249. *Harris vs. Booker,* 4 *Bing.* 96 *Buford vs. Buford,* 1 *Bibb* 306. *Thomas vs. Marshall, Hardin* 19. *Shute vs. Hardin,* 1 *Yerger* 3. *Modisett vs. Johnson,* 2 *Blackf.* 434. *Talbot vs. Chamberlin,* 3 *Paige,* 219.

Whatever interest Whitaker had remaining in the land, was a mere resulting trust; which is not subject to execution. *McDermott vs. Strong,* 4 *J. C. R.* 690. *Fontaine vs. Ferris,* 5 *J. R.* 335. *Scott vs. Scholey,* 8 *East* 467. *Brinckerhoff vs. Brown,* 4 *J. C. R.* 671.

The instrument in this case might, *in equity,* be a mortgage. If

the trustee had taken possession, equity would apply the rents and profits to extinguish the debt; and Whitaker or a subsequent encumbrancer would be entitled to an account.

The provision that, on payment, the deed is to be void, does not make it, *at law,* a mortgage. The fee is neither conveyed to the creditor nor left in the debtor. An estate in fee is created in the trustee, determinable on a condition. The estate never remains in the hands of a mortgagee, clothed with any fiduciary duty. He is never entrusted with the care of it, nor under any obligation to hold it for any one but himself. *Chalmondelsey vs. Clinton,* 2 *Jac. & Walk.* 1 to 189.

In the creation of estates, the form of the instrument determines, *at law,* its character. Equity looks behind the words: law does not.

There is a diversity betwixt a trust and a power of redemption. A trust is created by one contract of the party, and he may direct it as he pleases and provide for the execution of it: and, therefore, one that comes in *in the post* shall not be liable to it without express mention made by the party, &c. But a power of redemption is an equitable right inherent in the land, and binds all persons, in the *post* or otherwise. *Pawlet vs. The Atto. Genl. Hard.* 469.

An equity of redemption can be sold under execution, because the mortgagor until foreclosure is considered the owner of the land.

A use to cease upon condition always was valid, *as a use.* A use might be so limited as to be *revocable* at the will of the grantor, and give place to such new uses as he should appoint; or it might be so limited as to change from the original *cestui que use* to another person, on the happening of some future event. 1 *Cruise* 368. *Bac. Read.* 18.

A trust is a use not executed by the statute of uses. Consequently, the distinction between trusts and executed uses is, that in the former the legal estate is in the trustee, and in the latter in the *cestui. Benchett vs. Durdant,* 2 *Ventr.* 312. *Ayer vs. Ayer,* 16 *Pick.* 330. 10 *J. R.* 494. *Broughton vs. Langley,* 2 *Ld. Raymond* 878. *Wood vs. Wood,* 5 *Paige* 114. *Braman vs. Stiles,* 2 *Pick.* 460.

The only effect of the condition is, that after payment the trust would become an executed use. The trustee would hold the mere

naked title. He would do this, as well without the provision as with it. The provision is nothing but a conclusion of law.

The plaintiffs, if they wished to subject Whitaker's interest should have applied to equity.

JOHNSON, C. J., not sitting: MACLIN and ROANE, special judges, sitting with OLDHAM, J.

ROANE, special judge, delivered the opinion of the court.

This is an action of debt on sheriff's bond. The breach assigned is that the sheriff failed to levy an execution against Whitaker, against whom the plaintiffs, Ashley and Watkins, had obtained a judgment, upon a certain lot of land which he was directed by the plaintiffs to seize. The defendant filed a demurrer to plaintiff's declaration, which was overruled; and they then filed two pleas.—The first alleged that, before the rendition of the judgment, Whitaker had conveyed the land or lot, described in plaintiffs' declaration to one Goodrich and his heirs in fee simple forever, upon trust, however, to secure the payment to one George W. Johnston, by said Whitaker, of the sum of three hundred dollars, loaned by said Johnston, and for which said Whitaker had executed his note, to Johnston, due at twelve months from the date of said deed, with power to sell on failure of payment thereof. But if said sum of money should be paid by said Whitaker when due according to the tenor and effect of said note, then the deed was to be void, but otherwise that said Goodrich, as such trustee, should have full power to sell; and that since the return day of the execution, said land had been sold under said deed for less than the amount so secured thereby. The second plea alleged, generally, that Whitaker had no interest in the land. The plaintiffs replied to the second plea, and filed a demurrer to the first plea, which was overruled. The second plea, and the replication thereto, were then withdrawn, and the defendants had final judgment upon the demurrer to the first plea.

The question involved in this case is, had Whitaker such an in-

terest in the land described in plaintiffs' declaration as was subject to an execution?

"*The right of a mortgagor to redeem* his estate is liable to be taken upon execution by his judgment creditors." The equity of redemption is considered to be the real and beneficial estate, tantamount to the fee at law, and is accordingly held to be descendible by inheritance, devisable by will, and alienable by deed, precisely as if it were an estate of inheritance at law. The estate of a mortgagee, before foreclosure, or, at least before entry, is not the subject of execution; not even though there has been a default, and the condition of the mortgage forfeited. 4 *Kent's Com.* 159. *ib.* 160.— With regard to the persons who have the right to redeem, it is of course to be understood that any party, upon whom the law vests an equity of redemption, either by its own operation, or by the act of the parties, may redeem a mortgage. Indeed, the latter part of the proposition is but the repetition of the former, since such an equity of redemption itself is nothing but the right or power to redeem. It seems any one may redeem a mortgage, who is entitled to the legal estate of the mortgagor, or claims a subsisting estate under it. 1 *Hill. Abr.* 285. *ib.* 286.

But in this case a distinction is with much plausibility taken between the deed set forth in defendant's plea and a deed of mortgage; and there appears to be, in many respects, a substantial difference. The forms usually observed in the creation of an ordinary trust and a mortgage are different. Yet, if in attempting to create a trust for the use of a third person, all the rights and estate be reserved to the grantor, that are reserved in a mortgage proper, will it not result that the fee in the land deeded, will remain in the grantor to the same extent that it would, had the attempt only been to secure a debt or interest to a third person by mortgage? Then, if Whitaker's right to redemption under the trust deed in this case be the same as under a mortgage, will not the same rule apply as well in the one case as in the other? If Whitaker had conveyed to Goodrich in trust for the use of Johnston, unconditionally, and without reserving to himself any right of redemption upon the payment of money or the performance of any other duty, it would

have been strictly a deed of trust; and in that case Whitaker would have had no such interest in the land as could, by any known rule of law, have been the subject of execution: and in that state of case there would have been a good and valid excuse for the sheriff for his failure to levy.

But this conveyance is from Whitaker to Goodrich in trust to secure the payment of a debt from Whitaker to Johnston, with a power to Goodrich to sell the land conveyed in case Whitaker failed to pay the debt according to the tenor and effect of his contract: and it expressly stipulated that, upon such payment being made, the deed should be void. Which would seem to reserve to Whitaker the same right to redeem and unincumber his estate that he would have had under an ordinary mortgage. The right and power of Whitaker, as relates to redemption under this deed, being the same as they would have been under an ordinary mortgage, it is properly inferable that the rights and interest of creditors will attach as well in the one case, as in the other. If the deed had been a mortgage, all doubt would cease as to the right of redemption being the subject of execution. The optional power being reserved in the deed under consideration, to the grantor to the same extent that it would have been in a formal mortgage with the power of sale, it follows that the same rights attach as far as creditors are concerned as would attach, had the form of the deed been that of a mortgage. —Where lands are devised in trust, merely subjecting them to the payment of debts will not vest the legal estate in the trustee. *Hill. Abr.* 200, *sect.* 34.

The fee, then, remaining in Whitaker, and he having the same right to redeem, that he would have had in the case of a mortgage, and a mortgagor's right of redemption being subject to sale under execution, it follows as a necessary consequence that the judgment of the court below overruling the plaintiffs' demurrer to defendant's first plea is erroneous. Judgment reversed.