William and Mary Review of Virginia Law

Volume 1 (1949-1953)
Issue 3

Article 2

May 1951

The Prevailing Theory of Mortgages and Deeds of Trust in Virginia

Charles E. Van Fossen

THE PREVAILING THEORY OF MORTGAGES AND DEEDS OF TRUST IN VIRGINIA

Has Virginia the lien or title theory of mortgages and deeds of trust? Historically it was not questioned that Virginia adhered to the title theory of mortgages; the overwhelming majority of cases contained language leaving no doubt that title was considered to be in the trustee in cases of deeds of trust. Yet outstanding writers in recent years, including Dean Lile, Professors Glenn and Minor, and the editors of MICHIE'S JURISPRUDENCE, have accepted the view that the lien theory now prevails.[1] The purpose of this note is to suggest that the title theory is nevertheless more consistent with the decisions and should be considered the law in Virginia today.

A few early cases will serve to show how well settled the title theory originally was. In an 1819 case,[2] the court said, "It is not at this day to be questioned that the deed of a trustee conveys legal title. The trustee himself takes a legal, though defeasible title; and that title becomes absolute in his vendee by the deed in a court of law." In 1836 the court held that even after the debt had been paid, in the absence of a reconveyance by the trustee, the grantor could not pass legal title but only an equitable right.[3] As late as 1911, the court again indicated the title theory in *Marbury v. Jones*,[4] citing as authority for its decision the case of *Creigh's Heirs v. Henson*, 10 Gratt. 231 (1853), wherein the court said, "The possession of the grantor in a deed of trust, after the execution of the deed, is not adverse to the title of the trustee, but only as his tenant at will or sufferance. The trustee may eject him without notice, or, without ejecting him, may convey the trust subject to a purchaser, whose tenant at will or sufferance the grantor will then become, and by whom he may in like manner be ejected without notice. . . ."

In 1915 the court decided a case[5] cited by Glenn in support of the lien theory.[6] The case held that a deed of trust by the lessee did not violate a clause in his lease forbidding assignment of the lessee's interest without consent of the lessor. Superficially this seems to support the lien theory, since normally under the title theory the trustee may eject the grantor or convey away the property and must be held to have an interest. But on examination we find that the deed of trust here expressly limited the powers of the trustee, i.e., he was to have no right of possession, no control over the demised premises, no right to the rents and profits accruing from operation of the farm, and no rights of property therein. In fact, said the court, "the deed conferred upon the trustee the *bare legal title* to the property conveyed, seized with no beneficial interest

therein (italics added)" so that "in order that said deed of trust could act as such an assignment, it was necessary that there should have been not only a sale under the deed of trust, but the purchaser at such sale should have complied with the terms thereof thereby entitling him to enter in possession of the leasehold in so far as the authority of the trustee in the deed of trust could license him to do so. . . ."[8] It is submitted that the case is not inconsistent with the title theory, the powers incident to an ordinary deed of trust never having passed to the trustee.

The controversial case of *Gravatt v. Lane*[9] was decided in 1917. In this case the plaintiff claimed through the grantor of a deed of trust. The action was in ejectment, and the defendant urged as a bar the outstanding unsatisfied deed of trust. In overruling this defense the court said, "This question has never definitely been decided in this State. The great weight of authority, however, is that an outstanding, unsatisfied mortgage or deed of trust on land to secure a debt is regarded as a mere lien, and that the mortgagor or grantee may still maintain ejectment in his own name and the defendant will not be permitted to set up the outstanding mortgage or deed of trust to defeat the action."[10]

The cases are many in Virginia which recognize the rule that in ejectment plaintiff must recover on the strength of his own title, that the defendant can set up an outstanding legal title in another where such title is valid, subsisting, and operative.[11] Thus many of the legal writers cite *Gravatt v. Lane* as establishing the lien theory of deeds of trust in Virginia.[12] It is submitted by this writer that the case did not upset in one fell swoop all the decided cases recognizing legal title in the trustee. The court said, "While technically the legal title is in the trustee, it is only vested in him for a definite purpose, namely to secure a debt. Such a deed should be construed *in actions in ejectment* as a mere lien upon the property (italics added)." It appears that the court, rather than adopting the lien theory of mortgages, merely adopted an exception to the rule that the plaintiff in an action in ejectment must have legal title, holding as some states do that the mortgagor has good title against all the world except the mortgagee.[13] It would seem that at least the court was attempting to limit its decision to action of ejectment. One writer believes that the court inadvertently adopted the lien theory.[14] It is submitted that discussion of the situs of the legal title refuted any charges of inadvertence.

In *Interstate Railroad Company v. Roberts, Clerk*,[15] the court was asked to approve separate recordation taxes on two contemporary instruments. One purported on its face to be a lease of

railroad cars to defendant railroad at a stipulated rental with formal title to pass after the payment of $1,100,000 to the trustee-lessee. Admittedly this was taxable under Sec. 13 of the Tax Bill, VA. CODE ANN., 1919, as a "contract relating to the sale of rolling stock. . . ." The second instrument recited that the trustee had secured subscriptions toward the purchase price of the rolling stock from a third party, to whom it would issue interest bearing certificates and to whom it would apply the rentals called for in the first instrument; that in case of default by defendant railroad, the trustee would take possession of and sell the cars. In holding the second instrument not separately taxable as a deed of trust the court said, "The essence of a mortgage or deed of trust is that it creates a lien on property to secure a debt, and the second paper by itself is wholly ineffectual for that purpose, and constitutes a security for the certificates therein named only by virtue of its essential connection with the so-called lease. . . . The two papers are essentially one. . . ."[16] The case is not conclusive for either theory. Under either theory the instruments concerned would be read as one. Furthermore, since the recognition in equity about 1620 of the principle of equitable redemption in the mortgagor, it has been apparent that the basic idea is security for a debt under either theory.

Later courts have apparently not found the same revolutionary importance in the *Gravatt* case. In a 1927 case the court quoted from the pre-*Gravatt* period as follows, "The trustee in a deed of trust takes a legal, though defeasible title, and a deed from him to a purchaser conveys an absolute estate in a court of law, whether the conditions of the trust deed have been complied with or not. . . ."[17] The *Gravatt* case was not mentioned in the opinion.

If the lien theory prevails in Virginia, a purchaser from the trustee before default or at foreclosure, but with material departure from the terms of the trust deed would get nothing, since the trustee would have only a lien, not legal title. In *Everette v. Woodward*,[18] the plaintiffs, grantors in a deed of trust, sought to set aside in equity a foreclosure sale, naming as defendants the trustee, the purchaser at the sale, and the purchaser's intended grantee. The court, in remanding the case in equity on the grounds of material departure from the terms of the deed, expressed its view of the result at law: "The trustee's power of sale is coupled with an interest; that is, he holds the legal title, while the grantor in the trust deed has the equitable title. If the trustee sells the property and, in doing so, materially departs from the authority and directions in the deed, nevertheless legal title passes to the purchaser at the sale, and the sale can be assailed only in a court of equity where, as we have already seen, material departure from the provisions of

the deed will vitiate the sale."[19] Nowhere in this opinion is the *Gravatt* case cited as overturning this result of the title theory, and it is submitted that this case is more conclusive for the title theory than the *Gravatt* case for the lien theory.

Under the title theory the courts, without difficulty, find that since the trustee takes legal title he is a purchaser and, if he takes without notice of prior equities, will prevail over such equities. It has been so held in Virginia.[20] However some courts reach the same result under the lien theory by saying that the mortgagee receives a "legal interest"; hence a prior mortgage will prevail over a subsequent deed of sale to a bona fide purchaser if neither are recorded.[21]

Section 8-817 (formerly Section 2472) of the Virginia Code states, "The payment of the whole sum . . . which any . . . deed of trust may have been made to secure . . . shall prevent the grantee, or his heirs, from recovering at law by virtue of such . . . deed of trust property thereby conveyed, whenever the defendant would in equity be entitled to a decree, revesting the legal title in him without condition." This statute was applied in *Lynchburg Cotton Mill Co. v. Rives,* and was held to prevent a trustee in a deed of trust to secure a debt which had been satisfied from maintaining an action of ejectment for the land conveyed. If title had never left the grantor under the lien theory, what need was there to protect him from an action of ejectment by the trustee either before or after satisfaction of the debt? The statute was further interpreted to take the action of ejectment out of the trustee and authorize the grantor to maintain it. If legal title remains in the grantor after execution of the deed of trust, no statute is needed to grant him capacity to maintain ejectment. The statute has no meaning if interpreted under the lien theory, and while it antedates the *Gravatt* case, we should not lightly assume that a court decision has left us for thirty-four years with a meaningless, yet unrepealed, statute.

It is submitted in conclusion, therefore, that Virginia has the title theory of mortgages and deeds of trust, but as modified by Sections 55-58 through 55-60 of VA. CODE ANN. (1950), which seek to regulate the conduct of trustees in as far as the deeds of trust themselves do not.

ELDRED C. VAN FOSSEN

FOOTNOTES

1. See Lile, *Lien Theory of Mortgage or Deed of Trust,* 8 VA. LAW REV. 224 (1922); 1 GLENN, MORTGAGES § 20 at p. 128 (1943); 1 MINOR, REAL PROPERTY § 570, n. 6 (2nd ed., Ribble (1928);

13 MICHIE'S JURISPRUDENCE, MORTGAGES AND DEEDS OF TRUST § 37 (1951).

2. Taylor v. King, 6 Munf. 358, 366. *Accord,* Harris v. Harris, 6 Munf. 367 (1819).
3. Ruffners v. Lewis's Executors, 7 Leigh 720.
4. 112 Va. 389, 71 S. E. 1124.
5. Franklin Farm Plant Co. v. Nash, 118 Va. 98, 86 S. E. 836.
6. 1 GLENN, MORTGAGES § 20, n. 15 (1943).
7. Franklin Farm Plant Co. v. Nash, 118 Va. 98, 111, 86 S. E. 836, 840 (1915).
8. Id. at 114, 86 S. E. at 841.
9. 121 Va. 44, 92 S. E. 912 (1917).
10. Id. at 48, 92 S. E. at 913.
11. Merryman v. Hoover, 107 Va. 485, 59 S. E. 483 (1907); Holliday v. Moore, 115 Va. 66, 78 S. E. 551 (1913).
12. See note 1, *supra.*
13. 59 CORPUS JURIS SECUNDUM, MORTGAGES § 306b.
14. Lile, *Lien Theory of Mortgage or Deed of Trust,* 8 VA. LAW REV. 224 (1922). See 5 VA. LAW REV. 205 (1917).
15. 127 Va. 688, 105 S. E. 463 (1920).
16. Id. at 692, 105 S. E. at 464.
17. McClure Grocery Co., Inc. v. Watson, 148 Va. 601, 608, 139 S. E. 288, 291.
18. 162 Va. 419, 174 S. E. 864 (1934).
19. Id. at 426, 174 S. E. at 867.
20. Murphy's Hotel Co., Inc. v. Benet, 119 Va. 157, 89 S. E. 104 (1916); Runkle's Adm'r v. Runkle, 98 Va. 663, 37 S. E. 279 (1900).
21. 1 GLENN, MORTGAGES § 32 (1943).
22. 112 Va. 137, 70 S. E. 542 (1911).