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# Real Property - Is a Contract for the Sale of Land a Mortgage?

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legislative measure to prevent this outcome each time the issue appears in the courts.<sup>21</sup> The notice of pendency requirement, as between parties to the suit, should be regarded as directory.

JOHN B. CUMMINGS

## REAL PROPERTY — IS A CONTRACT FOR THE SALE OF LAND A MORTGAGE?

The plaintiffs purchased a house and paid for it with money which they borrowed from the defendant-appellant. "As a part of this loan transaction, the plaintiffs apparently assigned to the defendant their deed to the land and took back an unrecorded contract for deed . . ." <sup>1</sup> which provided for forfeiture and repossession in the event of default. Upon default the defendant repossessed the plaintiffs' house. In the plaintiffs' action for trespass,<sup>2</sup> *held*: the contract was a mortgage, subject to the same rules of foreclosure as are prescribed in relation to mortgages, and upon default of the contract, the lender had no right to repossess. *Mid-State Inv. Corp. v. O'Steen*, 133 So.2d 455 (Fla. App. 1961), *cert. denied*, 136 So.2d 349 (Fla. 1962).

The Florida mortgage statute<sup>3</sup> is comprehensive in its scope and should be liberally construed.<sup>4</sup> It defines a number of instruments not formally

. . . is an essential prerequisite to investing the court with jurisdiction of the subject matter of a suit in which the recordation of such a notice is required. *A lis pendens* . . . is the mode substituted by the legislature for the constructive notice to all the world of the pendency of such an action . . ." (Emphasis added.)

21. *Adams v. Kenson Supply Co.*, 137 So.2d 27 (Fla. App. 1962), recently decided by the Second District, followed the decision of *Trushin v. Brown*.

1. *Mid-State Inv. Corp. v. O'Steen*, 133 So.2d 455 (Fla. App. 1961). It would be more descriptive to refer to a contract for deed, or an agreement for deed, as an installment payment contract for the sale and purchase of real property. These instruments are generally unrecordable because they are not acknowledged, and because a provision usually found in this type contract prohibits recordation. See Agreement for Deed Form AA, in common use among Florida practitioners.

2. The plaintiffs' action was also one for conversion of the personalty located within the repossessed house.

3. FLA. STAT. § 697.01 (1961): "All conveyances, obligations conditioned or defeasible, bills of sale or other instruments of writing conveying or selling property, either real or personal, for the purpose or with the intention of securing the payment of money, whether such instrument be from the debtor to the creditor or from the debtor to some third person in trust for the creditor, shall be deemed and held mortgages, and shall be subject to the same rules of foreclosure and to the same regulations, restraints and forms as are prescribed in relation to mortgages.

"Provided, however, that no such conveyance shall be deemed or held to be a mortgage, as against a bona fide purchaser or mortgagee, for value without notice, holding under the grantee."

4. *Thomas v. Thomas*, 96 So.2d 771 (Fla. 1957); *Hull v. Burr*, 58 Fla. 432, 50 So. 754 (1909); *Bemort, Inc. v. Deerfield Beach Bank*, 134 So.2d 28 (Fla. App. 1961).

termed mortgages as "mortgages in fact under certain conditions."<sup>5</sup> Any instrument given for the purpose or with the intention of securing the payment of money is a mortgage,<sup>6</sup> "regardless of whether it contains any of the covenants incident to a mortgage or not."<sup>7</sup> In case of doubt as to whether an instrument is a mortgage or some other instrument, it should be construed to be a mortgage.<sup>8</sup>

The problem of whether or not a mortgage exists commonly arises in the area of conditional sales agreements.<sup>9</sup> The characteristics of a mortgage which distinguish it from a conditional sale are the vendee's right of redemption<sup>10</sup> and the vendor's remedy of foreclosure in the event of default.<sup>11</sup>

The vendee under an executory contract of sale is the equitable owner of the land, and the vendor under the contract retains the legal title as security for the deferred payments.<sup>12</sup> One authority has stated that "such transaction has all the incidents of a mortgage . . ." <sup>13</sup> Based upon this reasoning, it would appear that a contract for deed, recorded or not,<sup>14</sup> is within the purview of the Florida mortgage statute and therefore subject to the same rules of foreclosure.<sup>15</sup>

5. BOYER, *FLORIDA REAL ESTATE TRANSACTIONS* § 32.02[1], at 1002 (1961).

6. *Thomas v. Thomas*, 96 So.2d 771 (Fla. 1957); *Marcus v. Hull*, 142 Fla. 306, 195 So. 170 (1939); *Brumick v. Morris*, 131 Fla. 46, 178 So. 564 (1938); *Holmberg v. Hardee*, 90 Fla. 787, 108 So. 211 (1925); *Connor v. Connor*, 59 Fla. 467, 52 So. 727 (1910); *Hull v. Burr*, 58 Fla. 432, 50 So. 754 (1909); *Franklin v. Ayer*, 22 Fla. 654 (1886).

7. *Home Bldg. & Loan Co. v. Rivers*, 108 Fla. 23, 31, 145 So. 873, 876 (1933). "The form of the contract is immaterial . . ." *Holmes v. Dunning*, 101 Fla. 55, 57, 133 So. 557, 558 (1931). "An equitable mortgage arises from a transaction, regardless of its form, which resolves into a security, or an attempt or offer to pledge property as security for a debt or liability." [1957-1958] *FLA. ATT'Y GEN. BIENNIAL REP.* 550, 551. See 22 *FLA. JUR. Mortgages* § 94 (1958).

8. *Thomas v. Thomas*, 96 So.2d 771 (Fla. 1957); *Marcus v. Hull*, 142 Fla. 306, 195 So. 170 (1939); *Connor v. Connor*, 59 Fla. 467, 52 So. 727 (1910); see 22 *FLA. JUR. Mortgages* § 106 (1958).

9. It should be carefully noted that the term "conditional sale," as it is most commonly used, denotes a sale of personal property on installment payments with the vendor retaining the legal title as security until payment is made, and a "conditional sale" as used in the real property context would be more correctly termed a "sale with the right to repurchase." BOYER, *FLORIDA REAL ESTATE TRANSACTIONS* § 32.02[2], at 1004 (1961). If the grantor merely has the option of refunding the consideration to the grantee and thereby entitle himself to a reconveyance, the transaction would be considered a conditional sale rather than a mortgage. *Brumick v. Morris*, 131 Fla. 46, 178 So. 564 (1938); *Holmberg v. Hardee*, 90 Fla. 787, 108 So. 211 (1925); 22 *FLA. JUR. Mortgages* § 99 (1958).

10. When an instrument is deemed to constitute a mortgage, provisions in the instrument for forfeiture without process of law are not effective to cut off the vendee's right of redemption. *Crawford v. Crawford*, 129 Fla. 746, 176 So. 838 (1937); *Holmberg v. Hardee*, 90 Fla. 787, 108 So. 211 (1925); BOYER, *FLORIDA REAL ESTATE TRANSACTIONS* § 32.18[1] (1961).

11. *FLA. STAT.* § 697.01 (1961).

12. *Michaels v. Albert Pick & Co.*, 158 Fla. 877, 30 So.2d 498 (1947); *Miami Bond & Mortgage Co. v. Bell*, 101 Fla. 1291, 133 So. 547 (1931).

13. 9 THOMPSON, *REAL PROPERTY* § 4714, at 254 (1958).

14. The incident of recordation is of no consequence as regards the validity of a mortgage itself, but only provides protection for "a bona fide purchaser or mortgagee, for value without notice, holding under the grantee." *FLA. STAT.* § 697.01 (1961).

15. The pertinent parts of *FLA. STAT.* § 697.01 (1961) provide: "All conveyances

Technically, a deposit receipt agreement, a commonly used form of executory contract for the sale of real property, should fall within the purview of the Florida mortgage statute. However, a judicially created exception is apparent as forfeiture is generally permitted under this agreement, provided the amount forfeited is considered the reasonable amount of liquidated damages, and the amount does not shock the conscience of the court.<sup>16</sup>

The rationale in the instant case follows a rule of long standing in Florida<sup>17</sup> which requires the foreclosure of equitable interests in real property, and an opposite result would appear completely contrary to the express language of the Florida statute.<sup>18</sup> The facts of the *O'Steen* case clearly indicate that the unrecorded contract for deed was used in place of a mortgage arrangement.<sup>19</sup> The decision, however, casts serious doubts upon the legal right of a vendor of an unrecorded contract for deed in a typical "low down-payment lot purchase transaction"<sup>20</sup> to effect a forfeiture.<sup>21</sup> The defaulting buyer's right of redemption could appear to haunt the repossessing vendor,<sup>22</sup> subject always, however, to the rights of a supervening bona fide purchaser for value from the vendor without notice of the vendee under the prior unrecorded contract for deed.<sup>23</sup> In view of the *O'Steen* decision, the unrecorded contract for deed may offer less advantage to real estate developers as a security device than had been formerly believed.

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. . . or other instruments of writing conveying or selling property . . . for the purpose or with the intention of securing the payment of money . . . shall be deemed and held mortgages, and shall be subject to the same rules of foreclosure . . . as are prescribed in relation to mortgages."

16. *Beatty v. Flannery*, 49 So.2d 81 (Fla. 1950); *O'Neill v. Broadview, Inc.*, 112 So.2d 280 (Fla. App. 1959).

17. See BOYER, *FLORIDA REAL ESTATE TRANSACTIONS* § 32.18[1] (1961).

18. FLA. STAT. § 697.01 (1961).

19. "As a part of this loan transaction, the plaintiffs apparently assigned to the defendant their deed to the land and took back an unrecorded contract for deed, which was conditioned upon the monthly payment . . ." *Mid-State Inv. Corp. v. O'Steen*, 133 So.2d 455 (Fla. App. 1961).

20. In this type of transaction the vendor, a subdivider, gives the lot buyer an unrecorded contract for deed as the vendor's "security" for the balance of the purchase price. Although possession is usually permitted immediately, the buyer seldom moves onto the land for a period of years, if ever. See note 21 *infra*.

21. Because of the small monetary sums involved, vendees who suffer a forfeiture in violation of FLA. STAT. § 697.01 (1961) do not usually exercise their redemption rights to the wrongfully taken property; also, in the event their grantor sells to a bona fide purchaser for value without notice, the vendee is unable to assert his rights against the bona fide purchaser because of the proviso of the aforementioned section. See note 3 *supra*.

22. BOYER, *FLORIDA REAL ESTATE TRANSACTIONS* § 32.18[1] (1961).

23. FLA. STAT. § 697.01 (1961).