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Mortgages—Constructive Severance—Growing Corn

P. 265 (in which the principal contest was on other items of evidence). A similar conclusion is reached in *Beckett v. Northwestern Masonic Aid Association,* 67 Minn. 298, 69 N. W. 923, a civil case, in which the substances of which the targets were composed was not clearly stated, and in *State v. Asbell, supra,* in which the targets themselves were not introduced, but the testimony of witnesses as to the results of the experiment was given. In all these cases differences in the substances used as targets and the flesh actually shot were considered as going to the credibility, not the competency, of the evidence, and in *Irby v. State, supra,* and in *Rodgers v. State,* 93 Tex. Cr. R. 1, 245 S. W. 697, decided in 1921 and 1922, respectively, it was expressly held that to make experimental testimony admissible it is not necessary that the experiment be made under exactly similar circumstances to those of the case. F. W. F.

REAL PROPERTY.

Farmers' Bank of Hickory v. Bradley. Kansas City Court of Appeals, 1925, 271 S. W. 857.

MORTGAGES—CONSTRUCTIVE SEVERANCE—GROWING CORN. Action in replevin to recover growing corn, and damages for its detention. One Bassfield owed the plaintiff a large sum of money, and gave the plaintiff his note secured by a chattel mortgage on a field of growing corn. The corn stood on land owned by Bassfield, but subject to a deed of trust in favor of the Central Mortgage Company. The deed of trust was executed more than a year before the chattel mortgage. Subsequently, the land was sold under the deed of trust to the defendant, who took possession of the land and corn, and held the same until this action was filed. The plaintiff, as holder of the chattel mortgage, contends that until foreclosure the title and ownership of the land were in Bassfield, that the execution of the chattel mortgage was a constructive severance of the crop from the realty, and therefore the crop did not pass to the purchaser of the land under foreclosure. The court, agreeing with the contentions of the defendant, admitted that there could be constructive severance of a growing crop as between vendor and vendee, and held that the deed of trust on the land covered the crops thereon until severed, and there could be no constructive severance of the corn by the execution of a chattel mortgage as against the deed of trust on the realty.

As the decision above was contrary to the ruling of the Springfield Court of Appeals in the *Farmers Bank of Mt. Vernon v. Parker,* 215 Mo. 96, 245 S. W. 586, the case was transferred to the Supreme Court of Missouri, and is in that court at the present time. The facts in the Parker case were similar to the fact in the Bradley case above. The contention was over the right to growing wheat as between the holder of the chattel mortgage and the holder of the deed of trust. The court held, that the execution of the chattel mortgage on the growing wheat was a constructive severance of the wheat from the realty, making the wheat personalty, and as such belonged to the holder of the chattel mortgage. As authority for the decision, the court cited *Willus v. Moore,* 59 Texas 628; 46 Am. St. Rep. 284, *White v. Pulley, 27 Fed* 436, and a clause from Jones on *"Chattel Mortgages,"* but in addition they recognized *Jones v. Adams,* 370 re. 473; 59 Pac. 811; 50 L. R. A. 388, as authority to the contrary. The statement from Jones (5th Ed), sec. 130, page 188: "Growing crops are so far a part of the realty that upon entry of a mortgagee of the land, all the crops not severed pass under the mortgage. But a chattel mortgage of crops, made by the owner in possession, operates in law as a severance of them, so that they will not pass under the mortgage of the land upon the subsequent entry of the mortgagee and the sale of the realty under the mortgage." In *Willus v. Moore, supra,* the court, basing its decision on the Texas rule that a mortgage is a mere security for a debt, that the paramount title is in the mortgagor, and that no estate passes to the mortgagee till foreclosure, decided that by executing the chattel mortgage the mortgagor constructively severed the crop from the realty as against the mortgagee. In *White v. Pulley, supra,* the court, citing *Willus v. Moore* as authority, said, "A mortgagor is entitled to sever, in law or in fact, the crops which stand on his land any time prior to the destruction of his title by sale or entry under the mortgage," and decided that a chattel mortgage was such a constructive severance of the crops from the realty that the crop did not pass to the mortgagee under execution. However, the weight of authority seems to be contrary to the decision in the Parker case, supra, and in accord with the Bradley case, supra, and *Jones v. Adams, supra,* where the courts were opposed to the idea of constructive severance of the crop from the realty by the execution of a chattel mortgage on the crop. In *Jones v. Adams,* references supra, the court said, "Unless there is an actual severance, the crops pass with the title to the soil to which they are attached against the mortgagor, and a previous sale

or mortgage by him will not constitute a severance as against a purchaser at a foreclosure sale. The test is whether there is actual severance." There are many other cases which are opposed to the idea of constructive severance. In *Beckman vs. Sikes,* 35 Ka. 120, it was held that the lien of the mortgagee and the decree of foreclosure attached to growing crops as well as to the land, and that the purchaser of the land under the decree was entitled to growing crops as against the vendee of the mortgagee. In *Fruit Company v. Sherman Worrel Fruit Co.,* 142 Cal. 643; 76 Pac. 484, the court decided that a chattel mortgage cannot operate against a purchaser of a trust deed as a severance of the growing crop from the land. In *Riely v. Carter,* 75 Miss. 798; 23 S. W. 435, the court said in their opinion that the lien of the mortgagee attached to the growing crop until severed, as well as to the land. In a leading New York case, it is said that a prior mortgage takes precedence over a sale of the crop and thus takes precedence over the vendee's rights by purchase of the crop under execution levied on the crop, *Shephard v. Philbrick,* 2 Den. 174. The decision of the Supreme Court of Missouri when the Bradley case, supra, comes before it is a matter of conjecture. Should they decide as the Kansas City Court of Appeals did in saying that the execution of the chattel mortgage alone without any actual severance will not constitute such constructive severance as to entitle the holder of the chattel mortgage to the crop, they would seem to be supported by the weight of authority, but there is authority to the contrary. M. L. S.

Hardin v. Wolf et al., 148 N. E. 868. Supreme Court of Illinois, 1925.

JOINT TENANCY—DEED OF TRUST—SEVERANCE. A bill in equity for partition by Mark Hardin against Mary J. Wolff and others, in which William O'Brien intervened. Mark Hardin owned a lot improved by a brick building in the city of Chicago. The property was subject to two liens, one in favor of Mary J. Wolff, and the other in favor of a third party. Hardin conveyed the property to Mary J. Wolf, his daughter, who conveyed the property to a law clerk, who reconveyed the property to Mark Hardin and Mary J. Wolf to take and hold as joint tenants with a provision that on the death of one the survivor was to take all the residue of the property. It was the intention of the parties that the daughter was to take care of the father until his death, and that as payment she was to become owner of the prop-