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SALES AND TITLES UNDER DEEDS OF TRUST.

SEC. 1. *Subject stated, viz., conveyances in trust to secure debts.*—Conveyances of real and personal property to trustees in trust for the payment of the debts of the grantor, are of frequent occurrence both in England (Hill on Trustees 336), and in this country. Where the trust is for the benefit of creditors *generally*, it is usually

denominated an Assignment. The subject of Voluntary or General Assignments does not fall within the scope of this article. We propose to treat of those more limited or partial trusts in which a conveyance of real estate is made to trustees to secure the payment of some specified debt or debts, or to the mortgagee or creditor himself, who, for this purpose, is invested with the power of sale on default of the grantor to pay.[1]

When we use the term *deed of trust* we do not mean a case where the grantor parts wholly *with his title*, giving it to a trustee absolutely for the purpose of raising a fund to pay debts, though this is, properly speaking, a deed of trust. But we mean cases where the conveyance is to *secure a debt* in case of default, thus assimilating the transaction to a mortgage, and where the intention of the grantor, instead of parting with his estate, is to *retain it* in case he performs his legal obligation according to its terms. Instruments of this latter class are also, but less accurately, called deeds of trust, and are those which it is our design to consider. In substance they are mortgages with specific provisions for foreclosing or barring the equity of redemption. (See *Woodruff* vs. *Robb*, 19 Ohio 212, where the distinction between the two classes of cases is very plainly set forth.)

SEC. 2. *Importance of the subject—By whom and how treated.*—How important this subject is, will readily occur when it is remembered how extensively in this country as well as in England this mode of security is resorted to. An examination of it seems to be necessary in order to exhibit the present state of the law relating to it. The cases lie uncollected and scattered through the numerous volumes of the reports. Such an examination appeared to be the more necessary because the subject in its every-day practical bearings is not considered at any great length, or with any aim at completeness, in the usual elementary works. Thus Willard omits

[1] When partial conveyances in trust have or have not been held under special statutes to amount to assignments, see, generally, Burrill on Assignments 32; *Burrows* vs. *Lehndorf*, 8 Iowa 96; 11 Id. 151; 13 Id. 551; *Merchants' Manufacturing Company* vs. *Smith*, 8 N. H. 347; *Low* vs. *Wyman*, Id. 536; *Manufacturers' Bank* vs. *Bank of Pennsylvania*, 7 W. & S. 335; 12 Penna. Rep. 164; *Baker* vs. *Hall*, 13 N. H. 298; *Davis* vs. *Anderson*, 1 Kelly (Geo.) 176; *Wilson* vs. *Russell*, 13 Md. 495.

to consider it on the ground that it belongs to treatises on the practice of the law: Willard's Eq. 430, 450. Story's Commentaries contain but one brief allusion to it: Eq. Com. sec. 1027. Even Kent, though he made, both as a Judge and Chancellor, many important decisions on the subject, devotes less than three pages,—but those are characteristically terse and valuable—of his Commentaries to its consideration: 4 Kent, p. 146, *et seq.*

The notes of Mr. Wharton to Hill on Trustees contain the most satisfactory citation of the authorities bearing on this subject that I have met with, but they are intermixed with cases relating to cognate and even unconnected matters. The short chapter of Mr. Hilliard (Mortg. vol. 1, ch. vii.), though useful, by no means presents the subject in all of its aspects and details. Omitting merely speculative views and avoiding theoretical discussions, it shall be our humble aim to give the subject a *practical* treatment, with the sole design of facilitating the labors of the actively engaged practitioner.

SEC. 3. *Origin and history of powers of sale—Validity—And extensive adoption and use in England and America.*—In the civil law, a power of sale in the mortgagee is implied, and even an express agreement will not deprive him of it: 1 Dom. 360.

In the common law, mortgages with a sale clause or conveyances in trust, with power to sell and convey an irredeemable estate on default, "are comparatively of modern origin" (Coventry's Note, 1 Pow. on Mortg., 9 *a*, n. 1). Mr. Powell, in giving (Vol. 3, p. 1123) a form for such instruments, declares them to be then "in their infancy." Lord ELDON, in 1825, asserts that powers of this kind were unknown in his early practice. Yet nearly a century before, these powers were occasionally resorted to, and their validity was brought into discussion in *Croft* vs. *Powell*, decided in 11 Geo. 2 (A. D. 1729), and reported by Comyn, p. 603.[1] "This case," says Coote (Mortg. 129), "was considered as raising considerable ground for doubt, but, so far from it, it will, on consideration, seem

[1] The syllabus to *Croft* vs. *Powell* is as follows: "Mortgagee with power to sell, sells with notice of mortgage, without mortgagor, his estate is redeemable." The case was decided on grounds other than that the power was invalid: 4 Kent 146 n.

to be rather an authority in favor of these powers:" 1 Hilliard on Mortg., ch. 7.

Such powers were declared by KENT, C. J. (10 Johns. 196, A. D. 1813), "not to be in use in Great Britain." Yet a few years afterwards, he tells us, in his Commentaries, that they are found in England to be so convenient as to become of quite frequent use: 4 Kent 146. Their growth seems, indeed, to have been very rapid after their validity was established. Nor, considering the delays and difficulties incident to proceedings in Chancery to foreclose, and the prompt and efficacious remedy these powers afforded, is this remarkable.

Courts of equity have always held invalid, or viewed with great suspicion, all special agreements to impair or abridge the equity of redemption. And powers of the character under consideration were at first seriously doubted, and by Lord ELDON and others strenuously opposed, as tending to destroy the value of the equity of redemption; as putting the debtor in the power of the creditor, who was thus enabled harshly to take advantage of his necessities; and as investing the mortgagee, where the power was confided to him, with the character of a *trustee*, in a case where he is not free to act for the *exclusive* benefit of his *cestui que trust*, for he is, first, a trustee for himself, and, second, as to the residue for the mortgagor.[1]

But whatever doubt may have formerly existed, powers of sale inserted in mortgages or conferred upon a third person, are of frequent use in England, and the practice and validity of sales thereunder firmly established: 2 Cruise's Dig. 94; *Clay* vs. *Sharpe* (A. D. 1802), *apud* Sugd. on Vend. and Pur., App., 21; followed in 1811 by *Corder* vs. *Morgan*, 18 Ves. 344; Powell 9, *et seq.*, and notes; 4 Kent 146; 1 Hill. on Mortg. 124; Coote on Mortg. 10, 14, 124, 174; 2 Coll. R. 465, 568; 6 Bing. 121; Adams's Eq. 120; 11 Jur. 504; 15 Q. B. 155; 1 B. & C. 364; Sugd. on Vend. 326.

[1] Chancellor Kent (4 Kent's Com. 146 n.) considers Lord Eldon's aversion to this innovation as one of his errors. But where the power of the creditor is not regulated by statute, the grounds of Eldon's sturdy and persistent opposition seem not to be unreasonable, or his fears ungrounded.

Affording to the creditor an easy, cheap, and speedy remedy, and enabling him to avoid the vexatious delay, expense, and inconvenience of a foreclosure in Court and a sale under a decree, these powers have, in many of the States of the Union, become a favorite mode of security.

The validity of such powers, where conferred upon a trustee, is nowhere longer doubted; and, with the exception of two or three States, their validity is conceded even where they are given to, and are to be exercised by, the creditor himself:[1] 2 Story Eq., §

[1] NEW YORK.—Such powers are valid and usual. Their exercise was early regulated by statute: 2 Comst. 360; 7 Wend. 458; 7 Johns. Ch. 45; Id. 25; 1 Caines C. E. 1; 2 Cowen 195; 4 Kent 147; Id. 190 n., where the substance of New York statute is given.

MASSACHUSETTS.—These powers are valid: 2 Met. 29; 8 Id. 423; 3 Pick. 491. But they are not so common in this State as to raise a presumption that a mortgage contains them: *Platt* vs. *McClure*, 3 Wood. & Min. 151. Conditions of power must be strictly complied with or no title passes by the sale: *Smith* vs. *Provin*, cited Am. Law Register, April, 1863, p. 378.

INDIANA.—Sales under powers to secure debts were formerly authorized, but by the Revised Statute of 1852 it is different: *Wheeler* vs. *Hart*, 7 Port. 583.

DISTRICT OF COLUMBIA.—Valid and in use: *Newman* vs. *Jackson*, 12 Wheat. 570.

MISSISSIPPI.—These powers were decided valid in 1838 in *Sims* vs. *Huntley*, 2 How. (Miss.) 896. Since then they have been in familiar use, and the reports of that State abound with cases arising under them: 1 Freem. Ch. R. 105. Grantor's interest not subject to sale on execution, unless the debt is *fully paid:* 13 Sm. & M. 103; 26 Miss. 291.

NORTH CAROLINA.—Trust deeds are in common use as a mode of security. It would seem from a remark of HENDERSON, C. J., 1 Dev. Eq. 546, that in that State "the law will not trust the creditor to be both his own agent and that of the debtor" for the purpose of making a sale. In such a case the foreclosure must be in equity. But otherwise if the parties have agreed on a trustee: Id.; 4 Ired. Eq. 288; 5 Id., App. Grantor's interest subject to sale on execution: 1 Dev. (Eq.) 1541; Post, sec. 11.

MISSOURI.—Powers valid and sales irredeemable: *Carson* vs. *Blakely*, 6 Mo. 275; 21 Id. 313.

IOWA.—Same in Iowa. But by recent statute mortgages with sale clause and deeds of trust must be foreclosed in Court: 7 Iowa 450; 8 Id. 404; 10 Id. 238. As to validity of powers of sale, see 4 Iowa 482; 7 Id. 462; 11 Id. 598. Grantor's equity subject to execution sale.

WISCONSIN.—Powers of sale to mortgagee "are usual." The mode of foreclosure

1027; 4 Kent 146; 1 Hill. on Mortg. 90. See also *Longwith* vs. *Butler*, 3 Gillman 32, which contains a succinct reference to the history of the question in England and in some of the States, and the authorities bearing upon it. See also Judge EMOTT'S opinion,

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by notice and sale authorized and regulated by statute—the mortgagor has two years to redeem: *Byron* vs. *May*, 2 Chand. 103; *Walton* vs. *Cody*, 1 Wis. 420.

RHODE ISLAND.—Sales by mortgagee under power are recognised, but do not seem to be in common use: *Allen* vs. *Robbins*, Am. Law Register, May, 1863, p. 442; *Nichols* vs. *Baxter*, 5 R. I. 491.

TEXAS.—Mortgagee may execute power of sale: 4 Texas 20; 6 Id. 174. Mortgages are treated as mere securities, the title remaining with mortgagor till foreclosure. And it is the same as respects a deed of trust. Deeds of trust and mortgages, with power of sale, are the same in legal effect. In either case the grantor's right is subject to execution: *Wright* vs. *Henderson*, 12 Texas 43; Id. 47; 22 Id. 338.

ILLINOIS.—The validity of powers of sale in mortgages arose at an early day (A. D. 1845), and as there seemed to be "much diversity of opinion amongst the profession in that State," the subject was very fully examined by KOERNER, J., and both upon principle and authority the conclusion was reached that such powers are valid both in the civil and common law: *Longwith* vs. *Butler*, 3 Gill. 32; 15 Ill. 503.

ALABAMA.—Deeds of trust are in common use: *McGregor* vs. *Hall*, 3 Stew. & Port. 397. Mortgagee may exercise power of sale: 10 Ala. 504. Deed of trust treated substantially as mortgages: *Hogan* vs. *Lepretre*, 1 Port. (Ala.) 392. In either case interest of grantor may be sold on execution: 3 S. & P. 397, *supra*. But see limitation in this regard as to personal property: 5 Port. (Ala.) 189. Trustee takes legal estate: 4 Ala. 483; and may eject beneficiary unless the deed restrains him: 17 Id. 743. See generally, on these instruments in this state, 4 Port. 328; 2 Stew. 401; 4 Ala. 441, 483; 8 Id. 694.

CALIFORNIA.—Mortgagee may lawfully exercise powers of sale, and titles are valid: 2 Cal. 387; 4 Id. 107; 9 Id. 643.

KENTUCKY.—Whether the mortgagee may himself legally be clothed with the power to sell, so as to bar the equity of redemption, was never directly decided in this State. See *Ormsby* vs. *Tarascon*, 3 Litt. 405, and remarks of Court on p. 409. Before any decision the Act of 1820 was passed, which provides that title will not pass without a prior decree for a sale, unless the grantor shall join in the trustee's conveyance: *Ogden* vs. *Grant*, 6 Dana 473, where this statute is construed and applied: 7 Mon. 587.

MINNESOTA.—By statute a mortgage containing a power of sale may be foreclosed upon default by a public advertisement: R. S. 434, *et seq.* By statute the mortgagee may buy: 4 Minn. Rep. 30. The administrator of mortgagee may sign notice of sale and sell. Having given the notice, he may sell after his removal

1 Paige 57; *Lawrence* vs. *The Farmers' Loan and Trust Company*, 3 Kern. 200; *Bronson* vs. *Kinsie*, 1 How. (U. S.) 321. Further, see cases cited in note *infra*.

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with the consent of the special administrator: Id. 30. Notices, how advertised: *Lowell* vs. *North*, 4 Minn. 32. Change of time of sale: Id. 433. As to power of legislature to extend time and vary terms of redemption, where there are powers of sale: Id. 298, 483. Notice claiming too much by more than one-half, sale was set aside: Id. 542.

VIRGINIA.—Deeds of trust in daily use as securities. In an early but not thoroughly considered case (*Chowning* vs. *Cox*, 1 Rand. 306; 3 Leigh 654), it was held that where the creditor himself was constituted the trustee, and invested with the power of sale, he could not make a valid sale so as to bar the debtor or those claiming under him without a resort to a Court of Chancery. Admitted to be otherwise if the power is conferred upon a third person. *Chowning* vs. *Cox*, *supra*, recognised in the recent case (A. D. 1842) of *Breckenridge* vs. *Auld*, 1 Rob. (Va.) Rep. 154, though it is admitted in *Floyd* vs. *Harrison*, 2 Rob. 178, to be a departure from the well-settled doctrine elsewhere.

SOUTH CAROLINA.—Sales by mortgagees under powers for debts not in familiar use. But such powers are "not liable to any legal objection." Per WITHERS, J., *Mitchell* vs. *Bogan*, 11 Rich. (Law) 686 (A. D. 1857).

OHIO.—Deed of trust and mortgages with sale clause in use, and are valid: *Woodruff* vs. *Robb*, 19 Ohio 212; 16 Id. 469. A judgment is no lien on the equity of the grantor in a trust deed, and it cannot be sold on execution at law: *Morris* vs. *Way*, 16 Ohio 469.

TENNESSEE.—Trust sales in use: 2 Yerg. 294; 3 Hayw. 152; 6 Humph. 533; 5 Id. 612.

ARKANSAS.—So in this State: 1 Eng. 269; 6 Id. 94; 3 Id. 510; 15 Ark. 55; 18 Id. 101. Grantor's interest not subject to execution sale, even though the statute subjects equitable estates to sale: 15 Ark. 55.

MICHIGAN.—Mortgages with sale clause are usual in this State: *Mundy* vs. *Monroe*, 1 Mich. 70. Manner and mode of sale regulated by statute, and two years allowed for redemption: R. S. 501; *Kimball* vs. *Willard*, 1 Doug. 217; *Lee* vs. *Mason*, Am. Law Register, vol. 2 (N. S.), p. 126: Afterwards reduced to one year, but the Act could not constitutionally apply to existing or prior mortgages: *Caryill* vs. *Power*, 1 Mich. 369. So as to Act depriving mortgagee of right to bring ejectment: *Blackwood* vs. *Van Fleet*, Am. Law Register, July, 1863, p 571.

MARYLAND.—Mode of foreclosing: 7 G. & J. 143. In an early case it seems to have been considered that a sale by mortgagee did not bar the right to redeem: *Turner* vs. *Bonehill*, 3 H. & J. 99 (A. D. 1810). As to validity: 13 Md. 495. As a mode of security, such powers do not seem to be in very frequent use.

In the States not above named, while powers of sale are occasionally resorted to, they do not seem to be in frequent use.

SEC. 4. *Deeds of trust and mortgages, with power of sale, substantially identical.*—A mortgage with a power of sale, and a deed of trust where the power of sale is placed in a third person, are in substance the same. Some of the cases have denied this. But those taking this view are numerous. Kent defines a mortgage thus: "A mortgage is the conveyance of an estate by way of pledge for the security of debt, and to become void on payment of it. The *legal* ownership is vested in the creditor" (in case of a trust deed in the trustee primarily for the creditor); "but in equity, the mortgagor remains the actual owner, until debarred by his own default or judicial decree" (4 Kent's Com. 136). He refers to instruments with powers of sale as mortgages (Id. 146). No doctrine is more invincibly established than that every instrument *intended* to secure the payment of money or the performance of some collateral act, is a mortgage. This is the test: "If a transaction resolve itself into a *security*, whatever may be its *form*, and whatever name the parties may choose to give to it, it is in equity a mortgage:" per STORY, J., 2 Sumn. 533; Story's Eq., § 1018; *Cotterell* vs. *Long*, 20 Ohio 464, 472; *Wilcox* vs. *Morris*, 1 Murph. (N. C.) 116; 2 Dev. (Eq.) 555; 1 Wis. 527; 5 Ark. 321; 2 Texas 1.

In *Eaton* vs. *Whiting*, 3 Pick. 484, it was expressly held that a power to sell, superadded to an instrument intended as a security, did not deprive it of the attributes of a mortgage. Until the power is executed, the right of redemption, which is the true *indicium* of a mortgage, exists: *Bloom* vs. *Rensselaer*, 15 Ill. 505.

Willard declares such instruments to be equally mortgages, whether they do or do not contain a power of sale: Willard's Eq. 430.

Powell speaks of them as mortgages even where the land is conveyed to trustees: Mortg., pp. 9, 10.

Speaking of a conveyance of land to a trustee as collateral security for the payment of a debt, with power to sell on default, the Supreme Court of Ohio hold this language: "The deed now in question contained all the substantial qualities of a mortgage, and nothing more. It was a mere security for a debt, to be void

if the debt were paid. The fact that the conveyance was made to a person other than the creditor, and that it contained a power to sell, does not alter its character in this particular: *Woodruff* vs. *Robb*, 19 Ohio 217. In a similar and quite recent case in another state, the Court say: "This deed of trust was given to secure these notes, and in that respect it is the same as a mortgage, and it only differs from a mortgage with [illegible] of sale, in its being executed to a third person instead of the creditor: per WALKER, J., in *Sargent* vs. *Howe*, 21 Ill. 149. See also *Fanning* vs. *Kerr*, 7 Iowa 450; 8 Id. 404.

On the principle that the two classes of instruments were in substance legally identical, it was held that a bank, authorized by its charter "to hold lands *mortgaged* to it by way of security," might take a conveyance to trustees, with a power of sale, to secure a debt due to it: *Bennett* vs. *Union Bank*, 5 Humph. 612. The same principle finds an illustration in another class of cases. Thus, a railroad company were empowered to raise money by *mortgaging* their property, and it was decided that this would authorize the execution of a deed of trust by the company: *Wright* vs. *Bundy*, 11 Ind. (Tanner) 398, 404. This doctrine is yet further exemplified in still another class of cases arising under the recording acts. Thus, in Arkansas, there was a statute prescribing the county where "mortgages" should be recorded. The Court saw "no good reason why the statute did not embrace deeds of trust"—deeds of trust being generally regarded as mortgages, with power of sale. So, in *Magee* vs. *Carpenter*, 4 Ala. 469, deeds of trust were held to embrace mortgages, so far as to subject them to the same registry laws. So, in another State, the statutory regulations as to satisfying *mortgages* were held to include deeds of trust: *Wolfe* vs. *Dowell*, 13 Sm. & Mar. 103; *Smith* vs. *Doe*, 26 Miss. 291. Same principle: *Woodruff* vs. *Robb*, 19 Ohio 212, *Crosby* vs. *Huston*, 1 Texas 239, *et seq.*; *McGregor* vs. *Hall*, 3 Stew. & Porter 397.

Another illustration: In a state where mortgages usually contain a power of sale, and where the exercise of the power is regulated by statute, it was held that a bare authority to an agent in

a letter of attorney to execute a *mortgage*, there being nothing in the instrument specially excluding it, will include as an incident the power to insert a clause authorizing a sale on default: *Wilson* vs. *Troup*, 7 Johns. Ch. Rep. 25; s. c., 2 Cowen 195; 4 Kent's Com. 147.

In fine, the attributes of deeds of trust, and mortgages with a power of sale, are the same in the following essential particulars:—

1. They are both intended as securities, and therefore are, in a legal sense, mortgages.

2. In both, if not controlled by statute, the *legal* title passes from the grantor, but in *equity* he is, before the foreclosure, considered the actual owner.

3. In both, and as broadly in the one case as in the other, the grantor has the right to redeem; in other words, has an equity of redemption,[1] which can only be barred by a valid execution of the power or by judicial decree.[2]

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[1] There are a few cases which take a different view. Thus, in Mississippi, in one case the Court remark: "The interest of a grantor in a deed of trust is not analogous to the interest of a mortgagor, and is not the subject of a lien or execution at law:" *McIntyre* vs. *Agricultural Bank*, 1 Freeman Ch. Rep. 105. So in Arkansas: 15 Ark. 55. In this case the Court declares that a deed of trust differs from a mortgage in this, that "the equity of redemption, as well as the legal estate, is conveyed by the deed" (of trust), "or if reserved is dependent upon a contingency which never happens until the trust sale." It is a mistake to suppose that the equity of redemption is conveyed. In a later case, the same Court say that the grantor may redeem by paying the debt: *Hannah* vs. *Carrington*, 18 Ark. 85; 8 Ala. 694. That it is not conveyed: see *Harrison* vs. *Battle*, 1 Dev. Eq. 541; 2 Ired. (Law) 129; 7 Id. 418; 1 Jones (Law) 169. In *Crittenden* vs. *Johnson*, 6 Eng. 94, overruling *State* vs. *Lawson*, 1 Id. 269, the Court, in defining the difference between the two classes of instruments, use loose and even inaccurate language.

[2] Though there be a power of sale, the creditor may yet proceed judicially to foreclose. The power of sale is a cumulative remedy only, and does not oust the inherent equitable jurisdiction: *Bennett* vs. *Union Bank*, 5 Humph. 612; *Byron* vs. *May*, 2 Chand. (Wis.) 103; *Hipp* vs. *Hutchett*, 4 Texas 20; 15 Id. 267; *Walton* vs. *Cody*, 1 Wis. 420; 2 Id. 100; *Mariott* vs. *Givans*, 8 Ala. 694; 7 Id. 823; 21 Id. 573; 24 Id. 544; Willard Eq. 450. If from any cause the prescribed notice cannot be given, a resort to equity is the proper and indeed necessary course: *Sullivan* vs. *Hadley*, 16 Ark. 129; *Dutton* vs. *Cotton*, 10 Iowa 408. Under the New York statutes, the procedure must be in Court on all mortgages except those conditioned for the payment of money: *Ferguson* vs. *Ferguson*, 2 Comst. 360; *Jackson* vs. *Turner*, 7 Wend. 458.

That there are minor differences between the two classes of instruments arising from their form may be true, but so far as substantial rights are concerned, they are essentially the same. Thus, where the creditor is himself the trustee, he cannot, as we shall show more fully hereafter, buy at his own sale, at least not without the aid of an enabling statute; but it is otherwise where the trust is confided to a third person. This is one of the chief differences: *Bloom* vs. *Rensselaer*, 15 Ill. 506; but there may be others as to the mode of satisfaction and release.

SEC. 5. *Who may grant powers of sale—Infants—Married Women.*—Whoever is capable of making a valid disposition of property, may create a trust and grant a power of sale, unless restrained by statute: Hill on Trust. 46 *et seq.* That the author of a power of sale was under the requisite age when he executed the instrument, is, it seems, an objection which he alone can raise: *Ingraham* vs. *Baldwin*, 12 Barb. 9, 19.

In a very recent case, it was decided, upon general principles, that a deed of trust voluntarily executed by a *feme covert* to secure a debt due by her husband, was valid: *Young* vs. *Graff*, 28 Ill. 20. The powers of married women are so generally regulated by statutes in the various states, that it is not profitable to pursue the subject further here. See, generally, Hill on Trust. 46, 421, and note by Mr. Wharton.

SEC. 6. *Who should join in the execution of the instrument, and mode.*—It is not necessary that the person upon whom the power to sell is conferred, or that the *cestui que trust*, should join in the execution of the instrument, or sign the same, or signify his willingness to accept or execute the trust by any formal writing indorsed on the deed. Acceptance of or assent to the trust may be shown by parol, and it may be by words or acts: *Scull* vs. *Reeves*, 2 Green Ch. 84; *Leffler* vs. *Armstrong*, 4 Iowa 482; *Skipworth* vs. *Cunningham*, 8 Leigh 271; *Spencer* vs. *Ford*, 1 Rob. (Va.) 648; *Pope* vs. *Brandon*, 2 Stew. (Ala.) 401; *Hipp* vs. *Hutchett*, 4 Texas 20; *Flint* vs. *Clinton Co.*, 12 N. H. 432; Hill on Trust. 214, *et seq.*

The assent of the creditor is presumed, where the instrument is

beneficial, but not where he is delayed or prejudiced by it: *Shearer* vs. *Loften*, 26 Ala. 703; *Wiswall* vs. *Ross*, 4 Port. (Ala.) 328; *Mauldin* vs. *Armistead*, 14 Ala. 702; Hill on Trust. 337, and note, and cases cited; 16 Ala. 295.

While in such cases the assent of the creditor is presumed, the assent of the trustee is not necessary to the validity of the instrument, if the trust is a legal one: *Field* vs. *Arrowsmith*, 3 Humph. 442; 6 Id. 313; 2 Sneed 164; 2 Head 185.

Though made without knowledge of creditor, there can in no case be a revocation after his assent: *Galt* vs. *Dibrell*, 10 Yerg. 146.

SEC. 7. *Consideration—Debts of grantor—Contingent liabilities.*—The debt of the grantor is of course a sufficient consideration for a deed of trust: *Griffin* vs. *Doe*, 12 Ala. 783. Even where executed by a married woman to secure a debt due by her husband. *Supra*, Sec. 5.

Contingent liabilities are also a sufficient consideration.[1] Thus, deeds of trust to indemnify sureties will be upheld as against creditors of the grantor: *Hawkins* vs. *May*, 12 Ala. 673; *Roden* vs. *Jaco*, 17 Id. 344; *Graham* vs. *King*, 15 Id. 563, 5 Porter (Ala.) 191; *Thurston* vs. *Prentiss*, 1 Mich. 194; s. c., Walk. Ch. R. 529.

SEC. 8. *Nature and extent of powers of Trustees—The deed the source and limit of the power—How the power may arise.*—The powers and duties of trustees necessarily vary with the directions, limitations, and restrictions contained in the instrument under which they act. This creates and limits their authority. A trustee, says Chief Justice MARSHALL, speaking of instruments like those we are considering, "has no power which the deed does not expressly give:" *Wallis* vs. *Thornton*, 2 Brockenb. 422.

[1] In North Carolina, where the technical doctrines of the common law are more rigidly adhered to than perhaps in any other State, it was held that a deed of trust for land which has no *valuable* consideration, that is money or money's worth, is ineffectual to pass the title to the trustee. And hence where there was no consideration for such a deed, except that the land should be sold for the payment of debts for which the grantee was bound as surety of the grantor, it was decided not to operate as a bargain and sale: *Jackson* vs. *Hampton*, 8 Ired. (Law) 457.

This is true also in a general sense of executors, but not so strictly true as it is with respect to trustees acting under deeds. The executor derives his power from the will, but representing as he does the testator in regard to his whole personal estate, he has an extensive discretion in its management: Id.

Powers to sell, and sales made under them, are acts *in pais*. The authority granted, and its exercise, are matters which rest wholly upon the convention of the parties. They are matters of contract, not of jurisdiction. The authority to sell is derived from the power, not from the Courts, or, in the absence of statutory provision, from the law: *Doolittle* vs. *Lewis et al.*, 7 Johns. Ch. 45; *Beattie* vs. *Butler*, 21 Mo. 313; *Turner* vs. *Johnson*, 7 Ohio 216, 220, part 2. It follows that the purchaser of lands from a trustee under a power, is bound to look for and to understand the extent of that power. *Caveat emptor* applies: 2 Wash. (Va.) 70; *Denale* vs. *Morgan*, 5 Call. 417; 2 Fonbl. Eq. 152. "Taking under the power, he is bound to see that its terms are complied with: *Ormsby* vs. *Tarascon*, 3 Litt. (Ky.) 410. "It is," says Chancellor KENT, in 7 Johns. Ch. 48, "a well-founded principle, that where a person takes by execution of a power, he takes under the authority of the power, equally as if the power, and the instrument executing the power, had been incorporated into one instrument. The title rests upon the act creating the power, and takes effect as if created by the original deed." The object and design of the parties should be kept in strict view in ascertaining the nature and extent of the power: *Wilson* vs. *Troup*, 7 Johns. Ch. 25. Thus, "a right to sell implies a power to convey, for without it no sale could be made:" per TURLEY, J., 8 Humph. 568.

And while the power to sell should be, and in general is, *expressly* conferred, yet it may arise by *necessary* implication: *Purdie* vs. *Whitney*, 20 Pick. 25; *Williams* v. *Otey*, 8 Humph. 563; Hill on Trust. 342, and note; *Mundy* vs. *Vattier*, 3 Gratt. 518; *Linton* vs. *Boly*, 12 Mo. 567.

The power to sell need not be contained in the same instrument. Thus, where a debtor makes a mortgage in the usual way, without a power of sale, and at the same time, by a separate power of

attorney to a third person, authorizes him to sell on default for the benefit of the mortgagee, such power is valid, and a sale thereunder bars the equity of redemption: *Brisbane* vs. *Stoughton*, 17 Ohio 482.

The power, if changed, must be by writing, and, where the common law in this respect prevails, by writing of equal solemnity with the one creating the power: *Baldridge* vs. *Walton*, 1 Mo. 520, 523.

SEC. 9. *Irrevocable nature of the power of sale—Death, &c.*— The language of the authorities is uniform that the power to sell, whether given to the creditor directly or to a third person, is not a mere naked authority, but a power coupled with an interest or a trust, and is therefore irrevocable,[1] although the deed be not executed by the beneficiary, is not revoked by the execution of a subsequent mortgage or deed: *Wiswall* vs. *Ross*, 4 Porter (Ala.) 328. Being irrevocable by any act of the grantor, if living, the power of sale is not suspended or revoked by the death of the constituent or grantor, but may be executed afterwards.[2] The power is annexed to the estate, and is deemed an irrevocable part of the security: *Bergen* vs. *Bennett*, 1 Caines C. E. 1; *Wilson* vs. *Troup*,

[1] A deed of trust, although for the payment of debts *generally*, and although not executed by the creditors, cannot be revoked by the maker, although in England it is otherwise: *Walker* vs. *Chowder*, 2 Ired. Eq. 478; 6 Id. 463; *Stimpson* vs. *Fries*, 2 Jones (Eq.) 156; Hill on Trust. 337, and note. But a deed of trust for the benefit a specified creditor or creditors, is in no case revocable.

[2] The principle that the power is not revoked by death, is admitted in *Robertson* vs. *Paul*, 16 Texas 472, but it was yet held that its exercise was inconsistent with the statutes of the State requiring "claims for money" against the estates of decedents to be presented for allowance and approval before the administrator could legally pay them, and that the power could not therefore be executed after the death of the constituent: S. P., 26 Texas 205, *sed quere*. The decisions in other States are different. The power is not, as we have seen above, given by the law, but by the contract of the parties. "The argument that the death of Beattie" (the author of the power) "should suspend all proceedings under the power in the mortgage, in analogy to the suspension of all process of execution under the administration law against the estates of decedents, cannot be maintained:" per SCOTT, J., 21 Mo. 318. A mortgagee having a specific lien, need not present his claim for allowance unless he wishes to look to the estate for any deficiency: *Doe* vs. *Duval*, 1 Ala. 745.

7 Johns. Ch. 25; 2 Cowen 195; 4 Kent's Com. 147; *Wilburn* vs *Spofford*, 4 Sneed 698; 12 Ala. 487; *Hannah* vs. *Carrington*, 18 Ark. 104; Hill on Trust. 88, 338, note; *Beattie* vs. *Butler*, 21 Mo. 313; 7 Iowa 463; 17 Ill. 531; 1 Johns. Ch. 48; 7 Ind. 699.

But a power of attorney from debtor to creditor, authorizing the latter to sell and convey, and after paying himself account for the balance, is a mere naked power, and revocable: *Mansfield* vs. *Mansfield*, 6 Conn. 559.

SEC. 10. *What title or interest the Trustee takes in the land.*— "Upon the execution of a mortgage, the *legal* estate vests in the mortgagee, subject to be defeated upon the performance of the condition:" 4 Kent's Com. 154.

So the authorities are uniform that a deed of trust, such as those of which we are treating, places the *legal title in the trustee.*[1] It may be useful to cite some of the cases bearing on this point: *Anderson* vs. *Holloman*, 1 Jones (Law) 169; 7 Ired. (Eq.) 418; *Thornhill* vs. *Gilmer*, 4 Sm. & M. 153; *Brown* vs. *Bartee*, 10 Id. 268, 275; 13 Id. 103; 4 Ala. 483; *Sargent* vs. *Howe*, 21 Ill. 148; *Hannah* vs. *Carrington*, 18 Ark. 85; 8 Ala. 694; *Greenleaf* vs. *Queen*, 1 Pet. 138; *Morris* vs. *Way*, 16 Ohio 469; *Cook & Sargent* vs. *Dillon*, 9 Iowa 407; *Taylor* vs. *King*, 6 Munf. 358; Id. 367; 5 Leigh 370; 13 Gratt. 601; 2 Patt. & Heath. 240, 676; 2 Jones (Eq.) 156; 7 Ired. (Law) 418; 8 Leigh 271; 10 Leigh 183; 16 Ala. 414; 2 Blatchf. 62; 4 Wash. C. C. R. 38; 5 Gillman 236; 1 Dev. Eq. 541; 2 Ired. (Law) 129; 1 Jones (Law) 169; *Newman* vs. *Jackson*, 12 Wheat. 570.

But such title is a defeasible one: *Taylor* vs. *King*, *supra*, and other cases. And is subject to be defeated by the payment of the money, in accordance with the terms of the deed of trust: *Cook & Sargent* vs. *Dillon*, *supra*; *King* vs. *Merch. Ex. Co.*, 1 Seld. 547. Payment of the debt extinguishes power of sale, even as against a subsequent *bonâ fide* purchaser as the trustee's sale: *Cameron* vs. *Irwin*, 5 Hill 272; Id. 246; 2 Id. 566; 21 Mo. 320.

[1] As a consequence of this doctrine, it is held that the legal title of the trustee is not extinguished by an absolute conveyance from the trustor to the *cestui que trust*, the Court declaring that the doctrine of merger would not apply to such a case: *Brown* vs. *Bartee*, 10 Sm. & Mar. 268, 275; 13 Id. 103.

SEC. 11. *What right remains in the grantor—How vendible, &c.* The interest of the grantor or bargainor in a deed of trust, he having the right to his lands again after payment of the debts, is in effect an equity of redemption. And as such it may be conveyed by the debtor, subject to the deed of trust; and in those states where such equities are liable to execution, the resulting equitable interest of the grantor in a deed of trust may be seized and sold on execution:[1] *Harrison* vs. *Battle*, 1 Dev. Eq. 541.

And this interest may be thus sold, even before the trust debt is due, and consequently before the trustee is authorized to sell the legal interest: *Poole* vs. *Glover*, 2 Ired. (Law) 129. But the purchaser at such sale by the sheriff does not acquire the *legal* estate, that being in the trustee, and hence cannot maintain ejectment by virtue of the sheriff's conveyance: *Anderson* vs. *Holloman*, 1 Jones (Law) 169; 7 Ired. (Law) 418.

SEC. 12. *The powers are appendant to the estate—Effect of alienation by Trustee, &c.*—The legal estate being thus in the trustee or mortgagee, the power of sale comes under those powers which are *appendant* to the estate, and takes effect out of it.[2] The total alienation of the estate to which the power is appendant or annexed, operates at least at law as an extinguishment of the power: 1 Sugd. on Pow. 54. It is accordingly held that a quit claim from the trustee to the creator of the trust, even in fraud of

[1] In Mississippi, Ohio, Arkansas, and perhaps some other States, the English rule is adopted, and the interest of the grantor in a deed of trust is not subject to execution *at law* (see note to section 3, *supra*), the remedy of the creditor being in equity. But "the prevalent doctrine in the States of this Union is, that such interests may be levied on and sold by execution at law:" *McGregor* vs. *Hall*, 3 Stew. & Port. 397. So Kent, who says that "in this country the rule has extensively prevailed that an equity of redemption was vendible as real property on an execution at law:" 4 Kent's Com. 161, 160, 195, n. So if the trustee makes a sale and there is a surplus, this represents the equity of redemption, and the widow of the grantor is dowable in it. As to the *surplus* arising on such sales, the rights of the grantor and of creditors and lienholders thereto, more will be said hereafter.

[2] See Hill on Trust. 471, for illustrations of the distinction between powers appendant and those simply collateral, not being accompanied by any legal estate. Though a trustee may not take the fee, he may yet have power to convey the fee *Alger* vs. *Fay*, 12 Pick. 322.

the rights of the *cestui que trust*, reinvests the grantor in the deed of trust with the legal title, and a subsequent sale by the trustee will not give his purchaser the legal title. But equity would, in a proper case, doubtless relieve against the fraud of the trustee: *Huckabee* vs. *Billingsby*, 16 Ala. 414.

But if the power of sal is extinguished by a conveyance of the estate to which it is appendant, it may be revived by a reconveyance to the trustee: *Salisbury* vs. *Bigelow*, 20 Pick. 174. So where the first sale made by a trustee was abandoned by the parties, and afterwards a second sale was made by the same trustee, without any renewal of authority, both sales were disregarded, and the debtor permitted to redeem: *Hogan* vs. *Lepretre*, 1 Port. (Ala.) 392; *Doe* vs. *Robinson*, 24 Miss. 688.

SEC. 13. *Nature of the trust and of the cestui que trust's interest.*—The trustee or a mortgagee with power of sale, holds the land in trust, first, for the payment of the specified debts, and, secondly, for the benefit of the grantor or owner of the equity of redemption, if anything should be left. But the interest of the beneficiary in a deed of trust, or of a mortgagee with a power of sale, is not such an interest in the land as to be subject to execution at law before foreclosure, or at least before entry.[1]

[1] The nature of deeds of trust, and of the respective rights and interests of the parties thereto, came under discussion in North Carolina not many years ago in a contested election case, which excited considerable attention at the time. The Constitution of that State, among other qualifications to entitle a person to vote for a member of the Senate, requires the voter to be "*possessed of a freehold* of fifty acres of land for six months before and at the day of election." A contest arose, and the Senate submitted three questions, under this provision of the Constitution, to the Supreme Court:—

"1st. Is the vote of a *bargainor* or *grantor* in a deed of trust (to a trustee to secure debts to other persons with power of sale on default) legal?"

2d. Is the vote of such *trustee* legal?

3d. Is the vote of the *cestui que trust* legal?

RUFFIN, C. J., noted for his reverence of, and inflexible adherence to, the common law, communicating the opinion of the Court, holds:—

1st. That a bargainor or mortgagor is not a *freeholder*, and cannot therefore vote—the execution of such an instrument destroying his freehold estate.

2d. The same as to the beneficiary, because he has "neither a legal or equitable right to the land, but only a right to have his debt raised out of it."