An Agricultural Law Research Article

Ownership of Crops On Foreclosed Land, Priority of Crop Liens And After-Acquired Property Clauses In Farm Bankruptcies

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OWNERSHIP OF CROPS ON FORECLOSED LAND, PRIORITY OF CROP LIENS AND AFTER-ACQUIRED PROPERTY CLAUSES IN FARM BANKRUPTCIES

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I. The Farm Economy in General

> Both in their violence and their uprising they were being faithful to American tradition. . . . At Council Bluffs sixty had been arrested, but when a thousand of their fellow insurgents marched on the jail, they were hastily released. . . . . On the outskirts of a Kansas village police found the murdered body of a lawyer who had just foreclosed on a five-hundred-acre farm. . . . . Throughout Hoover's last winter as President there were foreclosure riots in Iowa . . . Lawyers representing insurance companies in the East were kidnapped and threatened with the noose until the home office relented and agreed to a mortgage moratorium. By the end of January 1933, John A. Simpson, president of the National Farmers Union, told the Senate Committee on Agriculture, "The biggest and finest crop of revolutions you ever saw is sprouting all over this country right now." Edward A. O'Neal, III, president of the American Farm Bureau Federation, added "[u]nless something is done for the American farmer we'll have revolution in the countryside in less than twelve months."[1]

Reminiscent of those last days of the Hoover Administration, our current farming industry has become overwhelmed

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[1] W. Manchester, The Glory and the Dream, A Narrative History of America 59 (1973).

with economic difficulties. America's agricultural industry, basic to our entire economy, has reached a crisis stage and the resultant problems are complex.[2] For instance, from 1979 to 1986 net farm income in Mississippi alone dropped an astronomical 500 million dollars, and one estimate put as many as one-third of its farmers on the verge of bankruptcy.[3] Indeed, the extent of the current crisis in Mississippi is aptly illustrated with a survey of the statistics for 1986, one of the worst years on record for Mississippi farmers.[4] In that year, the state suffered its worst drought in twenty-five years reducing yields by thirty-five percent, and farm income dropped to its lowest level in thirty years, down nearly fifty percent from 1985.[5]

In addition, beyond the problems of nature, there were even greater systemic problems. For example, U.S. farm exports, which peaked in 1981 at forty-four billion dollars, fell thirty-seven percent to 27.5 billion in 1986.[6] In that same year, U.S. agricultural exports to twenty-two of twenty-five consumer nations were down significantly from 1985.[7] This dramatic decline devastated farm operations in Mississippi, particularly in the Delta where at least fifty percent of agricultural sales are made to overseas buyers.[8]

The origins of this problem can be traced to a period of time between the mid-1970s and the early 1980s when the upward spiral of inflation created increased cash flows and spurred many farmers to buy additional land at inflated prices with money borrowed for a long term at high interest rates. The equity produced by continued inflation through the end of this period created collateral against which these farmers could borrow additional funds and allowed them to service their land debt and

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[2] The Kiplinger Washington Letter, Aug. 28, 1987, at 1.

[3] *See* Espy, *Citizen's Must Help Officials Overcome State's Obstacles*, Clarion-Ledger (Jackson, Miss.), Jan. 4,1987, at 1-H, col. 3 (Mississippi Congressman Mike Espy discussing proposed solutions to help revive Mississippi's depressed farming industry).

[4] Alderman, *Farmers Suffer Bitter Disappointment in 1986*, Commonwealth, Dec. 29, 1986, at 1.

[5] *Id.*

[6] Mississippi Economic Council, *Mississippi Delta Hit Hardest By The Decline In Exports, Mississippi Bus.*, Dec. 22, 1986, at 1.

[7] *Farming*, THE J. OF FIN. MGMT. FOR FARMERS AND RANCHERS, Nov.-Dec. 1986, at 11.

[8] Mississippi Economic Council, *supra* note 6, at 1.

continue operations. However, from the early 1980s to the present, the near disappearance of inflation, along with the precipitous decline in the export market, have caused a dramatic deflation in the value of land and thus the disappearance of the essential equity. For example, in Iowa, one of the hardest hit farm states, land values have dropped sixty-four percent since 1981.[9] In fact, since 1982 the value of farmland nationwide has plummeted by an average of thirty-three percent.[10] The most severe declines in 1986 were in the states of Alabama, Mississippi and Louisiana where land values dropped sixteen percent on the average."[11] Thus, farmers who obligated themselves in the late '70s and early '80s to long-term mortgages at high interest rates are now unable to service their huge land debts.[12]

II. The System of Agricultural Finance and the Current Crisis

At the center of this financial crisis is a complex system of agricultural finance, heavily laden with government programs and regulations. Cash flow in the agricultural economy depends primarily on three lending institutions, the largest being the Farm Credit System (FCS), a creature of Congress. The FCS was originally established to provide a stable source of capital for agricultural producers, and at its inception seventy years ago it was capitalized by the federal government.[13] However, in the mid-1960s, the borrower/owners of the system repaid the last of the federal funds.[14] Two arms of the FCS deal directly with agricultural producers: the Federal Land Bank and the Production Credit Associations. The Federal Land Bank was established in 1916 under the provisions of the Federal Farm Loan Act.[15] Its role in the system is to make long-term mortgage loans for the

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[9] Welsh, *Land Deals You Can Make Today*, Farm J., Sept. 1987, at 22.

[10] H.R. Rep. No. 100-295, 100th Cong., pt. 1, at 57 (1987). Based on this report, Congress enacted the Agricultural Credit Act of 1987. Pub. L. No. 100-233, 101 Stat. 852 (1987).

[11] Welsh, *supra* note 9, at 22.

[12] H.R. Rep. No. 100-295, *supra* note 10, at 56.

[13] 12 U.S.C. § 2001 (1982).

[14] H.R. Rep. No. 100-295, *supra* note 10, at 61.

[15] 2 J. Davidson, Agricultural Law, § 10.01 (1981).

purchase of land in rural areas.[16] As part of the Farm Credit Act of 1933,[17] Congress created local Production Credit Associations (PCA's) with their primary purpose being to make short-term crop production loans.[18]

Since 1933, there have been no significant changes in the structure of the Farm Credit System.[19] The FCS's total loan portfolio is now valued at 70.9 billion dollars,[20] although it has admittedly decreased in the last five years.[21] Nevertheless, Federal Land Banks have continued to command the market for farm mortgage credit, currently financing forty-three percent of the farm real estate market.[22]

The second largest agricultural lender is actually a group of lenders comprised of life insurance companies and other commercial lenders which now hold approximately twenty-two percent dollarwise of all outstanding agricultural mortgages.[23] In-

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[16] 12 U.S.C. § 2014 (1982). There are stipulated circumstances under which the Federal Land Banks are authorized to make continuing commitments on these long-term real estate loans. *Id.* The land banks can extend financial assistance to eligible borrowers for loan periods ranging between five and forty years. *Id.*

[17] W. STOKES, CREDIT TO FARMERS 41 (1973). The Farm Credit Act of 1933 was signed on June 16, 1933 by President Roosevelt after considerable congressional debate. *Id.* at 38. Congressman Wall Doxey of Mississippi was a sponsor of the bill and he laid down a principle which the system would have done well to have taken to heart:

> . . . the foundation and groundwork on which it (the Farm Credit Act of 1933) is based is sound business, economical administration, good banking, and mutual helpfulness and benefit to both the lender and the borrower through cooperative efforts of the government and the family.

Id. at 39.

[18] 12 U.S.C. § 2096 (1982). PCA's may also offer similar financial assistance, under qualified terms, to rural residents for housing and to persons furnishing farm-related services to farmers and ranchers. *Id.*

[19] H.R. REP. No. 100-295, *supra* note 10, at 64. The Farm Credit System is a nationwide cooperative with approximately 382 local associations owned wholly by the farmers and ranchers that borrow from them. H.R. REP. No. 100-295, *supra* note 10, at 65.

[20] Bailey and McCoy, *Tricky Ledgers to Hide Huge Losses, Financial Officials Use Accounting Gimmicks*, Wall St. J., Jan. 12, 1987, at 1, col. 6.

[21] H.R. REP. No. 100-295, *supra* note 10, at 65. In January, 1987 the FCS reported a loss of $4.2 billion. Bailey and McCoy, *supra* note 20, at 1.

[22] H.R. REP. No. 100-295, *supra* note 10, at 66. Although there has been competition from other institutions, the Farm Credit System's ability to obtain funds in capital markets on Wall Street historically allowed the system to offer lower interest rates to farmers and ranchers. The system's current problems have caused the loss of this competitive edge. *Id.* at 65.

[23] *Id.* at 66.

surance companies alone hold 11.6 billion dollars in agricultural loans nationwide.[24]

The nation's third largest agricultural lender is an assortment of federal agricultural loan programs, most of which are administered through the Farmers Home Administration (FmHA).[25] In contrast with the FCS, which has traditionally concerned itself with meeting the credit needs of the efficient commercial farmer through conventional banking principles, the FmHA was originally created to keep destitute small farmers on their land and to help them subsist through programs patterned after the Depression era Rural Rehabilitation programs. This focus was somewhat modified in the Agricultural Credit Act of 1961 which established the basic structure and content of today's FmHA programs.[26] FmHA has four basic loan programs: long-term loans for the purchase of farmland; short-term loans to meet operating expenses; emergency disaster loans to assist producers with losses caused by natural disaster, and economic emergency loans which assist producers with miscellaneous economic problems beyond their control.[27] In September 1986, FmHA held 14.2% of all agricultural loans, valued at 29.6 billion dollars.[28]

Due to the downturn in the agricultural economy, these lenders have acquired literally millions of acres of land through foreclosures and bankruptcies.[29] FmHA alone now owns 46,000 farm properties with a combined acreage greater than the land area of Rhode Island.[30] Dubbed the "farm lender of last resort," the FmHA has 270,000 loans. Of this number, approximately one-third of the debtors are having problems making repay-

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[24] Mosby, *Effects of Farm Bankruptcy Statute Already Being Felt*, Clarksdale Press Reg., Dec. 12, 1986, at 1.

[25] 7 U.S.C. § 1981 (1982).

[26] 2 J. DAVIDSON, *supra* note 15, at §§ 11.01-11.11.

[27] H.R. REP. No. 100-295, *supra* note 10, at 71.

[28] *Id.*

[29] The Kiplinger Washington Letter, *supra* note 2. *See also* Welsh, *supra* note 9, at 22 (Farm Credit Services and Farmers Home Administration desire to dispose of acquired land has resulted in increased activity in the land market).

[30] H.R. REP. No. 100-295, *supra* note 10, at 72. The FmHA obtained these properties through forced liquidation (i.e. foreclosure) and through voluntary conveyances. (deed in lieu of foreclosure). *Id.*

ment.[31] In six years the dollar amount of delinquent loans has risen from 820 million dollars to 6.3 billion dollars. Of that 6.3 billion dollars, 4.8 billion dollars (76%) is overdue by three years or more and a significant portion may never be recovered.[32]

In addition to these uncollected FmHA debts, the FCS, as of June 30, 1987, was holding loans totalling 6.47 billion dollars for which neither principal nor interest payments were expected.[33] The FCS reported losses in 1985 of 2.7 billion dollars and 1.9 billion dollars in 1986. It likewise projected total losses for 1987 of 1.28 billion dollars, 1.09 billion dollars for 1988, and 742 million dollars for 1989.[34] The epidemic has also spread to private institutions. For instance, between 1984 and April of 1987, 168 farm banks failed nationwide.[35]

The future is not significantly brighter. As of October 1987, agricultural exports were up seventeen percent over 1986. However, virtually all of the increases were in cotton, livestock, fruits, and vegetables, and the cost to the government was 2.3 billion dollars in subsidies.[36] Land values in 1987 began to stabilize,[37] but because government subsidy payments supported the value in many cases, the only good investments were considered to be in land which could support itself without a subsidy.[38] In land acquisition, agricultural producers today are emphasizing

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[31] Bailey and McCoy, *supra* note 20, at 18, col. 2.

[32] H.R. REP. No. 100-295, *supra* note 10, at 72.

[33] *Id.* at 57. In addition, the system held another $5.3 billion in high risk loans requiring extensive servicing as well as an inventory of $1.1 billion worth of property. *Id.*

[34] *Id.* The FCS apparently remains solvent on paper only because, in 1986, Congress allowed it to adopt the fiscally unsound "non-GAAP" (Generally Accepted Accounting Principle) practice of turning its losses into assets and writing them off over twenty years.

[35] H.R. REP. No. 100-295, *supra* note 10, at 57. The Agricultural Credit Act defines a farm bank as a commercial bank with at least 25% of its loans in agriculture. *Id.*

[36] A. Knox, *Forking Out for Exports*, FARM J., Oct. 1987, at 26. For example, the United States sold 150,000 tons of wheat to China at $1.88 per bushel. Exporters, through the Export Enhancement Program (EEP), received an additional 92 cents subsidy per bushel. In effect, approximately one-third of the sale value was due to the subsidy. *Id.*

[37] Welsh, *supra* note 9, at 22. The favorable returns on investments for cropland, due in large part to government programs helping to produce 7 to 10 percent net returns on investments, are bolstering the market. *Id.*

[38] *Buying Land? Consider This . . .*, FARM J., Sept. 1987, at 37. The best strategy is to buy top quality land that can support itself without program payments. *Id.*

return on investment, not the price of the land.[39] The most recent proposal to Congress is to cut farm subsidies by forty-two percent by the end of 1991.[40] Consequently, if price supports are reduced, exports will again decline, and the value of any farmland dependent upon subsidy payments will in all probability decline sharply. If so, the problems of recent years can only be expected to continue and intensify.[41]

Because of these unpredictable economic factors and the widespread purchase of farm land at inflated prices in the late 1970's and early 1980's followed by the disappearance of inflation and the equity it created, attorneys in agricultural areas are increasingly encountering some unique problems in the areas of property and land finance law.

In addition to familiarizing practitioners with the nature of the problem and the principal players involved, this article attempts to provide a brief summary of the law on three interrelated problems: ownership of crops on foreclosed farmland; priority of liens on these crops; and the effect of after-acquired property clauses in bankruptcy. Specifically, this article will identify the various Mississippi and federal statutes involved and briefly explore the operation of those statutes as construed by various commentators and courts in Mississippi and elsewhere. This article does not attempt to provide a "hornbook" treatment of these subjects, but rather provides a summary of the law for those practitioners who may be encountering these mounting farm problems for the first time.

III. The Problem

Against this economic backdrop, consider the following hypothetical which unfortunately is occurring today at an alarming rate:

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[39] Welsh, *supra* note 9, at 22. *Id. See also, Buying Land? Consider This, supra* note 38, at 26. (concluding that time to buy land is now while it is priced right and land market prices already reflect factored-down government payments).

[40] Clarion-Ledger (Jackson, Miss.), Jan. 6, 1987, at 8B.

[41] *Buying Land? Consider This, supra* note 38, at 37. In addition, when buying land, avoid poor quality land unless it fits your particular investment strategy. For example, one land broker advises: "Buy good ground and you pay for it once - buy poor ground and you pay for it the rest of your life." *Id.*

In January 1987, Richard Roe purchased Black Acre Plantation. He borrowed his purchase money from the Farmers Home Administration (FmHA) and gave FmHA a deed of trust in return.

Roe decides to grow soybeans and cotton and in April of 1987, he borrows the funds necessary to produce his crops from the Production Credit Association (PCA) to be repaid in full no later than January of 1988. He gives PCA a UCC Security Agreement and Financing Statement. His financing statement covers not only his 1987 crops, but it also has an "after acquired-property" clause which grants PCA a security interest in all after-acquired crops or the products or proceeds thereof whenever acquired. The financing statement is properly filed and is effective for five years from the date of filing subject to the right of PCA to render it effective indefinitely by filing a continuation statement every five years.[42]

In January 1988, Roe defaults in the repayment of his loans to FmHA and PCA. Then, in February 1988, Roe files for liquidation under Chapter 7 of the Bankruptcy Code.[43] In April 1988, Roe plants his 1988 crops on Black Acre. In June of 1988, Roe receives his discharge in bankruptcy. Included in his discharge are all debts previously owed to both FmHA and PCA. In July 1988, the Farmers Bank loans Roe funds to be used for the expenses of 1988 crop production. Roe gives the Farmers Bank a UCC Security Agreement and Financing Statement covering his 1988 crops. In August 1988, before the crops are harvested, the trustee forecloses on the Black Acre deed of trust and FmHA buys Black Acre at the foreclosure sale. Notwithstanding the foreclosure, Roe continues to occupy Black Acre and continues to care for and produce his crops.

IV. OWNERSHIP OF CROPS ON FORECLOSED LAND

Who owns the 1988 crop on Black Acre and what are the

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[42] MISS. CODE ANN. § 75-9-403(2) (1972). The effectiveness of a filed financing statement lapses on the expiration of the five year period unless a continuation statement is filed prior to the lapse. *Id.*

[43] 11 U.S.C. §§ 701-766, (1982)(outlining liquidation procedures in a chapter 7 bankruptcy).

lien priorities as to this crop? At common law, the mortgagee or beneficiary in a deed of trust, upon foreclosure, became the owner of growing crops. However, crops which were mature and ready to harvest or already harvested belonged to the mortgager or tenant.[44]

A procedure that comes into play in this scenario is the common law summary process of forcible entry and detainer, which has been codified in most states, including Mississippi.[45] Actually, Mississippi has two parallel and virtually identical procedures. One procedure has been established for use in justice court[46] and a second for use in county court.[47]

These statutory provisions provide, *inter alia*, that:

> Any . . . mortgagee, or trustee . . . against whom the possession of land is withheld, by his . . . mortgagor, grantor, or other person, after the expiration of his right by contract, express or implied, to hold possession, . . . shall, at any time within one year after such . . . withholding of possession, be entitled to the summary remedy herein prescribed.[48]

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[44] Reiley v. Carter, 75 Miss. 798, 801, 23 So. 435, 436 (1898)(on confirmation of sale in foreclosure, purchaser claimed as absolute owner, and thus had absolute right to all unsevered crops left by defaulting mortgagor); Allen v. Eldering, 22 N.W. 842, 842 (Wis. 1885)(standing oats became property of purchaser of land under foreclosed deed of trust only after such sale was confirmed by the court). Later, by enacting the unlawful entry and detainer statute, the Mississippi Legislature mitigated this earlier common law rule. Under the statute the mortgagor has the right to all crops growing on the property at the commencement of foreclosure proceedings. MISS. CODE ANN. § 11-25-25 (1972). The statute also provides that the evicted mortgagor has the right to re-enter the land for the purpose of completing cultivation and removal of his crops. *Id.*; *see also* Garner v. Stuart Co., 222 Miss. 290, 297, 75 So. 2d 747, 749 (1954)(tenant had right after expiration of lease to reasonable time in which to enter land and collect his growing crop); Wood v. Pace, 164 Miss. 187, 198, 143 So. 471, 473 (1932)(defaulting mortgagor could stay and collect his pecan crop where it was cultivated, maintained and fertilized by him, and such crop was still on trees); Upperman v. Littlejohn, 98 Miss. 636, 646, 54 So. 77, 78 (1910)(where tenant leased land for one year, crops grown during that year were vested in tenant, subject to statutory lien of landlord). *See generally* Annotation, *Right to Crops Grown by One Wrongfully in Possession of Land*, 39 A.L.R. 958 (1925)(as supplemented in Annotation, 57 A.L.R. 485 (1928))(discussing cases contemplating ownership of unsevered crops on wrongfully possessed land).

[45] MISS. CODE ANN. §§ 11-25-1 to -119 (1972).

[46] MISS. CODE ANN. § 11-25-1 to -31 (1972).

[47] MISS. CODE ANN. §§ 11-25-101 to -119 (1972).

[48] MISS. CODE ANN. §§ 11-25-1 to -101 (1972)(note that both § 11-25-1 and § 11-25-101 of the unlawful entry and detainer statutes contain this same language).

In the event of a judgment for the plaintiff, the court issues a writ of possession to the plaintiff, enforceable by the contempt powers of the court.[49] However, with reference to growing crops, the forcible entry and detainer statutes provides:

> . . . [I]n case of foreclosure of deeds in trust or mortgages, the mortgagor shall be entitled to cultivate and gather the crops, if any, planted by him and grown or growing on the premises at the time of the commencement of the suit; and shall, after eviction therefrom, have the right to enter thereon for the purpose of completing the cultivation and removing the crops, first paying or tendering to the party entitled to the possession a reasonable compensation for the use of the land. The court may, on demand of the defendant, adjudge the sum to be paid or tendered.[50]

While the forcible entry and detainer statutes apply in the case of a grantor under a deed of trust refusing to leave the land after foreclosure and sale by the trustee to a third party,[51] this remedy is available only if the suit is instituted within one year after the right of possession accrues under the trustee's deed,[52] and a defendant who raises this one year statute of limitation as a defense has the burden of proving when his possession became adverse.[53] This statute grants a defendant farmer the right to complete cultivation and removal of his crops provided he first tenders to the plaintiff a reasonable compensation for use of the

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[49] MISS. CODE ANN. § 11-25-23 to -113 (1972)(parallel provisions).

[50] MISS. CODE ANN. § 11-25-25 to -115 (1972)(parallel provisions). For a more complete discussion of this statutory provision and further case law involving ownership of crops on foreclosed land, see *supra* note 44.

[51] *See* Martin v. Leslie, 229 Miss. 656, 659-60, 91 So. 2d 743, 744 (1957)(where grantors remained in possession of property after foreclosure sale and refused to surrender property to grantee of foreclosure sale purchaser, such grantee was entitled to possession of property and reasonable compensation for its use under forcible entry and detainer statute); *cf.* Garner v. Stuart Co., 222 Miss. 290, 296, 75 So. 2d 747, 748-49 (1954)(grantor entitled to reasonable time to gather growing crop after eviction).

[52] MISS. CODE ANN. §§ 11-25-1 and -101 (1972)(parallel provisions). *See also* Anthony v. Bank of Wiggins, 183 Miss. 885, 892, 173 So. 454, 455 (1937)(mortgagee suit for unlawful entry and detainer dismissed where action was not instituted within one year after right to possession accrued).

[53] Ellis v. Knight, 239 Miss. 836, 838, 124 So. 2d 694, 695 (1960)(defendant claiming that statute of limitations had run on forcibly entry statute has burden of proving when his possession became adverse).

land. This portion of the statute is remedial and thus should be construed so as to give full effect to its stated purpose.[54] Therefore, the plaintiff is not entitled to both the rental value of the land *and* the profits from the crop.[55] Under section 11-25-115, growing crops are considered personal property and even after being dispossessed by writ of possession, the mortgagor is entitled to a reasonable time within which to go upon the land and gather and remove his crops provided he has made payment of a reasonable rent.[56]

Since this is a summary procedure, a judgment for or against the plaintiff does not bar a later action in the circuit court between the same parties regarding the same land.[57] Likewise, a judgment under the forcible entry and detainer statutes is not res judicata as to a later suit in chancery court to confirm title as against an adverse claimant.[58]

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[54] MISS. CODE ANN. §§ 11-25-1 and -101 (1972)(parallel provisions). *See also* Wood v. Pace, 164 Miss. 187, 196, 143 So. 471, 473 (1932)(court recognized remedial purpose of unlawful entry and detainer statute, and liberally construed it to give former tenant possession of pecans still growing on trees); Joiner v. Leflore Grocer Co., 145 Miss. 31, 50-51, 110 So. 857, 860 (1926)(purchaser at foreclosure sale was not entitled to rent due on property leased by tenant, but only reasonable rental for use after foreclosure, with court noting that statute's purpose was remedial); Parks v. Kline, 118 Miss. 119, 125-26, 79 So. 81, 81 (1918)(citing its remedial purpose, court held operation of statute was not confined to only those crops planted by mortgagor, but action could also be brought for reasonable rental against tenant of mortgagor).

[55] MISS. CODE ANN. §§ 11-25-21 and -111 (1972)(parallel provisions). *See also* Ellis. v. Knight, 239 Miss. 836, 839, 124 So. 2d 694, 695 (1960)(prevailing plaintiff in unlawful entry and detainer action was not entitled to both rental value and loss of anticipated farming profits); Leavenworth v. Crittenden, 62 Miss. 573, 579 (1885)(purchaser of Mississippi river front property entitled to reasonable compensation for use and occupation of the premises from former owner who refused to vacate).

[56] Garner v. Stewart Co., 222 Miss. 290, 75 So. 2d 747, 749 (1954)(tenant had right after eviction to reasonable time in which to enter land and harvest his growing corn crop).

[57] MISS. CODE ANN. § 11-25-119 (1972). *See also* Tate v. Tate, 217 Miss. 734, 736, 64 So. 2d 908, 908 (1953)(court allowed subsequent proceeding in unlawful entry and detainer brought by appellee to obtain possession of house and lot).

[58] Elmer v. Holmes, 189 Miss. 785, 797, 199 So. 84, 87 (1940). In *Elmer*, the appellant claimed title to a beach front house in Biloxi by adverse possession under a parol gift from her father-in-law in 1918. She set up as a defense an earlier decision in an unlawful entry and detainer case favorable to her. *Id.* at 85. Appellee had purchased the house at a foreclosure sale under a deed of trust executed by the heirs of the appellant's father-in-law. *Id.* The Mississippi Supreme Court ruled that an earlier judgment between the same parties, which held that appellee, a foreclosure sale purchaser, was not entitled

If a third party who has purchased the land from a trustee under a deed of trust fails to meet the one year statute of limitations or simply disagrees with a previous judgment on the forcible entry and detainer issue, he may still bring an action for ejectment against the former defaulting owner who refuses to quit the land.[59] Being an action at law, it is normally brought in the circuit court. However, if the defendant (former owner) seeks to raise equitable defenses which could not be raised in a court of law, and there are other errors of jurisdiction, the case may be transferred to the chancery court.[60] The statute of limitation for bringing an action for writ of ejectment is ten years.[61]

When the new landowner pursues an action for ejectment, rather than the unlawful entry and detainer action, the question again arises as to the ownership of crops growing on the land issue. Because the crops were regarded as part and parcel of the realty, the old rule at common law was that one who recovered land in ejectment was entitled to the crops then growing on the recovered land.[62] This has been modified in Mississippi by

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to possession under an unlawful entry and detainer suit, was not a bar to the purchaser maintaining an action to confirm title as against the adverse claimant. *Id.* at 87.

[59] MISS. CODE ANN. §§ 11-19-1 to -105 (1972). *See also* Hytken v. Bianca, 186 Miss. 323, 330 (1939), 186 So. 624, 625 *reh'g granted*, 188 So. 311, 312 (1939)(section of code does not preclude equitable defense to action in ejectment).

[60] Hudson v. Bank of Edwards, 469 So. 2d 1234 (Miss. 1985). In *Hudson*, the Mississippi Supreme Court reversed the circuit court's granting of summary judgment for the appellee bank on grounds that there were material disputed facts before the trial court at the time of decision. *Id.* at 1239. The appellant asserted "fraudulent means" as his sole defense and requested, along with remand, a transfer to chancery from circuit court in order for his equitable defense to be heard. *Id.* The Mississippi Supreme Court, in remanding the case to Chancery, stated that where reversal is appropriate because of other errors independent of jurisdiction, the case should be remanded to the court which is best fitted to administer justice. *Id.* at 1240. *See* Thompson v. First Mississippi National Bank, 427 So. 2d 973, 975-76 (Miss. 1983)(circuit court's transfer of issue of punitive damages to chancery court denied plaintiff opportunity to litigate important substantive right and deprived plaintiff of right to trial by jury which was error other than as to jurisdiction; accordingly, judgment was reversed and case remanded to circuit court for trial on merits).

[61] MISS. CODE ANN. § 15-1-7 (1972).

[62] Carlisle v. Killebrew, 89 Ala. 329, 6 So. 756, 757 (1889). In *Carlisle*, appellant, an ejected farmer, was denied the right to recover for his crops of cotton, corn, and fodder taken by appellee who had recovered the land from the appellant in an earlier ejectment action. *Id.* at 757. *See also* Harrod v. Burke, 87 Kan. 909, 92 P. 1128, 1129 (1907)(at common law, crops growing on land at time of recovery of land through ejectment are

statute:

> If the jury find for the plaintiff in an action of ejectment, and the defendant have a crop then planted and growing upon the premises in question, it shall assess a reasonable rent for the plaintiff to receive for the use of the premises, for such time as it may think necessary for the defendant to make and gather his crop. If the defendant enter into bond with security, to be approved by the court, or by the clerk in vacation, in a penalty of double the amount of rent so assessed, payable to the plaintiff, conditioned for the payment of the rent assessed at the expiration of the term fixed by the jury for the defendant to hold possession of the premises, then a writ of possession shall not issue upon the judgment in the action, until the expiration of the time so allowed by the jury. . . .[63]

Thus, in the hypothetical proposed, the FmHA would, under common law, have owned the growing crops upon foreclosure, but Roe would still have owned any matured or severed crops. However, as modified by Mississippi statute, Roe would actually own *all* the crops, but would be required to pay FmHA a reasonable rental for use of the land. However, since a mortgagor is entitled to possession until foreclosure, the rent would run only from the date of foreclosure and not from the date of default.[64] Roe's crops would still, however, be subject to liens cre-

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regarded as part of realty and pass to plaintiff in absence of evidence showing any right of severance in favor of other party). This rule rests on the proposition that, in law the defendant is regarded as a trespasser, and upon the theory that the crops still standing on the land and affixed to the soil are "part and parcel" of the land and are not personal property, therefore recovery of the land necessarily includes the crops. 21 AM. JUR. 2d *Crops* § 31 (1981).

[63] MISS. CODE ANN. § 11-19-87 (1972).

[64] MISS. CODE ANN. § 89-1-43 (1972). *See* Myers v. Hobbs, 100 F.2d 822, 824 (5th Cir. 1939)(rent not allowed until foreclosure and mortgagee is in rightful possession). *See also* Joiner v. Leflore Grocer Co., 145 Miss. 31, 48, 110 So. 857, 860 (1927)(purchaser at mortgage foreclosure sale is not entitled to rent for use of land prior to foreclosure, but only to reasonable rental for use of land after foreclosure.); Reiley v. Carter, 75 Miss. 798, 804, 23 So. 435, 436 (1898)(on judicial confirmation of foreclosure sale, title to all crops then unsevered passes to purchaser); Kessee v. Sloan, 69 Miss. 369, 370, 11 So. 731, 731 (1892)(purchaser of land at partition sale is entitled to rent falling due after purchase if not expressly reserved); Farmer's Loan & Trust Co. v. Avers, 67 Miss. 208, 7 So. 358, 358 (Miss. 1890)(before foreclosure, mere possession of trustee under deed of trust is insufficient to sustain action for conversion of crude turpentine taken from trees on land before trustee's possession was acquired).

ated by secured crop production loans as will be discussed next.

V. PRIORITY OF CROP LIENS

Under the common law, crop liens were governed by the law of chattel mortgages. The general chattel mortgage rule was that if a crop mortgage was written to cover the crop year during which the advances were made as well as the following crop year or years (an "after-acquired property" clause), it was only an equitable mortgage as to the future years. Therefore, if the mortgagee refused to make future advances and the tenant mortgaged the later crop to another mortgagee for supplies to make a crop which otherwise would not have been made, then the later mortgage was granted priority.[65] The reason for giving priority to the later mortgage was because:

> . . . . [T]he merchant who furnished the supplies and advances to make the crop under the second deed of trust would have the higher or better equity, in that it was by his help and by his means that the crop was made and without which it might not have been made at all.[66]

Chattel mortgage law has been supplanted by section 9-312(2) of the Uniform Commercial Code, a model provision which is now codified in Mississippi at section 75-9-312(2) of

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[65] Butler Merchantile Co. v. Cruise, 175 Miss. 200, 207, 166 So. 325, 326 (1936). In *Butler*, the appellee was unable to produce a 1930 crop on his lands without financial help for which he applied to appellant. *Id.* at 325. In return, the appellee executed a mortgage to appellant for all crops to be grown on his lands during 1930 and 1931. *Id.* Appellee had to apply for aid from appellant again in 1931 but was refused because appellant was going out of business. *Id.* Appellee then requested advances from Hymen Merchantile Co. which agreed to loan the appellee the necessary money. *Id.* Subsequently, Hymen Merchantile Co. assigned the indebtedness due it by the appellee to the First National Bank of McComb. *Id.* In determining which party had the rights to the 1931 crop, the Mississippi Supreme Court held that a valid crop mortgage could be given only in the crop grown during the year the advances were made and that if the mortgage purported to cover future crops, it was at most an equitable mortgage good between the parties and did not constitute a valid first lien. *Id.* at 326. *See* Coffey v. Land, 176 Miss. 114, 117, 167 So. 49, 51 (1936)(prior mortgage on crops of future year was only equitable and new mortgage was to be first in priority because without second merchant's financial help crop might never have been produced); Myers v. Hobbs, *supra* note 64, at 823-24 (Farm Credit Administration holding tenant's crop mortgage had priority in proceeds of crops raised by tenant over land mortgagor's claim because had FCA not come to tenant's aid there would have been no crops grown).

[66] *Coffey*, 176 Miss. at 117, 167 So. at 51.

the Mississippi Code. This section states:

> A perfected security interest in crops for new value given to enable the debtor to produce crops during the production season and given not more than three (3) months before the crops become growing crops by planting or otherwise takes priority over an earlier perfected security interest to the extent that such earlier interest secures obligations due more than six (6) months before the crops become growing crops by planting or otherwise, even though the person giving new value had knowledge of the earlier security interest.[67]

Thus, under section 75-9-312(2), a subsequent perfected security interest in crops takes priority over an earlier perfected security interest, but only if the following conditions are met:

1. The crop production security interest must be taken in exchange for new value;

2. The new value must be given "to enable the debtor to produce the crops during the production season";

3. The new value must be given "not more than three (3) months before the crops become growing crops by planting or otherwise"; and

4. The earlier security interest must be to secure an obligation which is more than six (6) months *overdue* at the time the crops become growing crops.[68]

The web becomes further tangled when future advances are involved. Subject in some cases to the UCC rules governing purchase money security interests and judicial process lien creditors, a creditor with a perfected security interest making a future advance takes priority as to the future advance over a subsequent creditor with a security interest perfected in the interim between the perfection of the first security interest and the fu-

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[67] *Id.* Codified in Mississippi as MISS. CODE ANN. § 75-9-312(2) (1972). *See also* United States v. Minster Farmer's Cooperative Exchange, Inc., 430 F. Supp. 566, 571 (N.D. Ohio 1977)(on action for conversion of crops by defendant, where security interests of both plaintiff and defendant in same after-acquired crops of debtor attached at same time, defendant's security interest was not entitled to priority under U.C.C. § 9-312 (2)).

[68] MISS. CODE ANN. § 75-9-312(2) (1972).

ture advance.[69] The only way, therefore, that the second creditor can protect itself is to search the UCC records for earlier filings and refuse to make a loan unless the debtor pays off the prior creditor or obtains a subordination agreement.[70] Notice that these UCC crop lien priority rules are the opposite of the law regarding future advances on real property. Under the law of real property in Mississippi, after actual notice of the attaching of a junior lien is provided, a senior mortgagee ordinarily will not be protected in making future advances under his mortgage given to secure such advances unless he was under a binding obligation to make them.[71]

Under the hypothetical proposed, the Farmers Bank meets the first three criteria of section 75-9-312(2). It also appears at first blush to meet the fourth. When it made its 1988 crop production loan in July of 1988, the note to PCA which was payable in January of 1988 was more than six months overdue. The problem is that it was not more than six months overdue at the time the 1988 crop became a "growing crop" in April of 1988. Therefore under the UCC, the Production Credit Association would maintain its first lienholder status as to the 1988 crop based on its "after-acquired property clause." However, as seen in the next section, the bankruptcy would in most circumstances, extinguish PCA's lien as to the 1988 crops.

VI. After-Acquired Property Clauses and Bankruptcy Law

With certain exceptions, section 552(a) of the Bankruptcy Code provides that property acquired by the debtor or the bankrupt estate after the filing of a petition in bankruptcy is not sub-

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[69] Miss. Code Ann. § 75-9-312(7) (1972).

[70] Miss. Code Ann. § 75-9-312(7) (1972). *See also* Miss. Code Ann. § 75-9-316 (1972)(persons entitled to priority of security interests may agree to subordination).

[71] North v. J.W. McClintock, Inc., 208 Miss. 289, 44 So. 2d 412, 414 (1950). *See also* Ewing v. Krafft Co., 158 A.2d 654, 658 (Md. 1960)(lender subordinated to intervening lienors where lender had actual knowledge of intervening liens when he made additional optional advances); Riggs v. National Bank v. Welsh, 254 A.2d 172, 174 (Md. 1969)(voluntary advances made by senior lienor, with actual knowledge of intervening liens, rank behind those intervening liens); Heller v. Gate City Building and Loan Assoc., 408 P.2d 753, 755 (N.M. 1965)(first mortgagees, with actual knowledge of intervening liens making future optional advances cannot obtain priority for subsequent advances over intervening liens).

ject to any lien resulting from an after-acquired property clause in a security agreement entered into before the filing of the petition.[72] Simply stated, this provision nullifies any pre-petition liens to the extent they include any property acquired by the debtor after the filing of bankruptcy. Thus, if a farmer plants his crops before he files bankruptcy, then a perfected security interest, including an after-acquired property clause, would attach to the crops and proceeds of the crops realized post-petition. However, under most circumstances, a pre-petition security interest will not attach to crops planted after the debtor files for bankruptcy.[73] Even though section 552(a), in most circumstances, avoids a pre-petition security interest in property acquired by the debtor after filing bankruptcy, under section 552(b),[74] a creditor generally retains its security interest in post-petition proceeds, products, and offspring of property in which he acquired an interest prior to the commencement of the bankruptcy case.[75] Thus, the question to be answered under section 552(a) is whether the debtor planted his crops before or after filing his petition in bankruptcy. If planted after the bankruptcy petition was filed, then they are not subject to a lien created by a pre-

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[72] 11 U.S.C. § 552(a) (1976).

[73] *See, e.g., In re* Wallman, 71 Bankr. 125, 127 (Bankr. S.D. 1987)(creditor's otherwise properly perfected pre-petition future crop security interest extinguished regarding crops planted post-petition); *In re* Hardage, 69 Bankr. 681, 685 (Bankr. N.D. Tex. 1987)(crops subject to pre-petition security interest planted prior to commencement of bankruptcy proceeding are subject to attachment under creditor's post-petition liens); Hugo v. United States Farmers Home Admin., 50 Bankr. 963, 967 (Bankr. E.D. Mich. 1985)(discussing 11 U.S.C. § 552 which nullifies pre-petition liens to extent that they include after-acquired property of debtor).

[74] 11 U.S.C. § 552(b) (1976).

[75] *In re* Bohne, 57 Bankr. 461, 463 (Bankr. N.D. 1985). *See also* J. Catton Farms, Inc. v. First Nat'l Bank of Chicago, 779 F.2d 1242, 1246 (7th Cir. 1985)(where bank held perfected security interest which included farmer's crop proceeds, even if acquired after bankruptcy, these should be included as lender's security unless enforcement is deemed inequitable); *In re* Wallman, 71 Bankr. 125, 127 (Bankr. S.D. 1987)(properly perfected pre-petition future crop security interest of Farmers' Home Administration did not attach to crop planted post-petition); *In re* Oliver, 66 Bankr. 426, 428 (Bankr. N.D. Tex. 1986)(creditors entitled to debtor's post-petition rental income for crops grown by third party lessee on leased farmland where creditors possessed secured pre-petition liens); *In re* Pigeon, 49 Bankr. 657, 659 (Bankr. N.D. 1985)(creditors retain under 11 U.S.C. § 552(b) interest in proceeds and property acquired prior to debtors commencement of bankruptcy proceedings).

petition after-acquired property clause. If planted before the petition was filed, then they are subject to the pre-petition security interest. The question to be answered under section 552(b) is who has rights in proceeds acquired by the debtor's estate post-petition from the disposition of property acquired pre-petition.[76] In order to prevail under section 552(b), the creditor with a pre-petition security interest must be able to show that proceeds from the sale of pre-petition crops have been used to finance post-petition crops.[77]

Even assuming the crop was planted pre-petition and the after-acquired property clause attaches a security interest thereto, if the crop was planted within ninety (90) days of the filing of the bankruptcy, the security interest can be avoided under section 547[78] as a preferential transfer.[79] If a security interest attaches to crops planted pre-petition, the value of the security interest is not cut off by section 552(a) and, therefore, determined as of the date of the filing of the petition in bankruptcy. The value of the security interest is equal to the full value of the harvested crop.[80] However, under section 506(c)[81] of

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[76] *In re* Lorenz, 57 Bankr. 734, 736 (Bankr. N.D. Ill. 1986)(bank's security interest did not extend to cash proceeds generated by 1985 crop planted after debtor filed for bankruptcy).

[77] *Hugo*, 50 Bankr. at 967. *See* MISS. CODE ANN. § 75-9-306 (1972)(defining proceeds as receipts received upon sale, exchange, or other disposition of collateral or proceeds).

[78] 11 U.S.C. § 547 (1976). This section updates the preference provisions bringing them into conformity with the Uniform Commercial Code. *Id.* Preferences are described in pertinent part:

> [T]he trustee may avoid any transfer of an interest of the debtor in property - (1) to or for the benefit of a creditor; (2) for or on account of an antecedent debt; (3) made while debtor was insolvent; (4) made - (A) on or within 90 days before the date of the filing of the petition . . .; (5) that enables such creditor to receive more than such creditor would receive if (A) the case were a case under chapter 7 of this title; (B) the transfer had not been made; and (C) such creditor received payment of such debt to the extent provided by the provisions of this title.

Id. § 547(b).

[79] *See, e.g., In re* Lemley Estate Business Trust, 65 Bankr. 185, 189-90 (Bankr. N.D. Tex. 1986)(crop planted within 90 day time frame of 11 U.S.C. § 547(b) so FDIC forbidden to recover crop proceeds because recovery would constitute preference under § 547(b)).

[80] *See, e.g., In re* Randall, 58 Bankr. 289, 291 (Bankr. Ill. 1986).

[81] 11 U.S.C. § 506 (1976). The trustee may recover from property securing an allowed secured claim the reasonable necessary costs and expenses of preserving, or dispos-

the Bankruptcy Code, the debtor is entitled to deduct the costs of maintaining, harvesting and marketing the crops.[82]

In the hypothetical proposed, since Roe planted his 1988 crops subsequent to filing his petition in bankruptcy, the after-acquired property clause in PCA's 1987 financing statement does not create a lien in favor of PCA against his 1988 crops. However, if Roe used any proceeds from his 1987 crops to finance his 1988 crops, PCA would have a lien against his 1988 crops to the extent of the 1987 proceeds used.

VII. Conclusion

In today's volatile farm economy, farm failures and bankruptcies are commonplace. Because the law of real property, UCC crop liens, and bankruptcy all apply and may sometimes conflict, the rights of the farmer, land purchase lender, and crop production lender are oftentimes difficult to sort out. The basic rules, however, are that the beneficiary under a foreclosed deed of trust may remove a farmer holding over from the land under either the summary process of forcible entry and detainer or writ of ejectment. Crops growing at the time of ejectment still belong to the farmer and he may re-enter the land to finish cultivation and harvesting of his crops as long as he pays a fair rental (forcible entry and detainer) or posts a bond double the rent (ejectment).

A lender making a loan for crop production should first search the UCC filings and require the farmer either to pay off all earlier crop loans or obtain a subordination agreement. Failing this, the lender should make sure that the loan complies with the requirements of the UCC provisions set out in section 75-9-312(2) of the Mississippi Code. Most importantly, the lender should be aware that his crop production loan will not take priority over an earlier crop production loan with an "after-acquired property" clause unless the earlier loan is at least six months overdue at the time the crops become "growing" crops.

Finally, both lenders and farmers should be aware that a

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ing of such property to the extent of any benefit of the holder of such claim. *Id.* § 506(c).

[82] *Id.*

security interest in crops created by a security agreement with an after-acquired property clause is cut-off by the farmer filing bankruptcy. Thus, if a farmer is contemplating bankruptcy and continued operations afterwards, it would be in his best interest to file bankruptcy first and then plant his crops. If the farmer, however, uses proceeds from a crop harvested prior to filing bankruptcy to finance crops planted after filing bankruptcy, creditors' pre-petition liens will attach to his post-petition crops and proceeds.