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SECURITY INTERESTS IN CROPS

Part One*

By Milo Whitney Smith†

One of the oldest relationships recognized at law is that of debtor and creditor. The unfortunate fact that there are far more of the former than the latter, while the latter have usually had the financial influence, has led to a constant battle between the two groups, with first one side and then the other attaining the ascendancy in the attempt to obtain the most favorable position in the law. But neither side can afford too great a victory, lest the other perish. The law of security transactions is the focal point of this struggle.

The problems which have arisen around this focus are so basic, and so pervasive that it is almost impossible to deal with any segment of them without invoking the entire body of the law. With this disability in mind, the scope of this paper is nonetheless a restricted one—as restricted as is possible.

The financing of agricultural operations is a tremendous field, and one which has many ramifications, economic and social. Generally speaking, the problems all center about a single source of rights—the crops produced by the land. Each person who is involved in the process of producing and financing the growing of crops is interested in obtaining for himself the security of a prior right to those crops. The number of claimants to a single crop can grow to alarming size, as each invokes the aid of the law to assure himself of a tangible return for his investment of money or labor.

In treating the problem of these conflicting interests, it has been found that certain areas have been fairly well mapped out; that certain interests have been so regulated, or so defined, as to render discussion of them of little value. But other interests are as yet unsettled, or involve resolutions of the conflict which seem to be undesirable. It is to these areas that attention has been turned. Rather than attempting an analysis of the entire field of rights in crops, it has been the purpose of this paper to treat the areas in which it is felt that the law remains in a developing stage, or those areas in which the law is confused.

The problem areas which have been selected may be considered in relation to the parties involved: The owner of land, the cultivator of the crop, those who extend credit to either of these parties in return for a mortgage

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upon an interest in the crop, and those who extend credit in return for a mortgage upon the land itself. To a large extent the rights of the mortgagees of an interest in land or crop are determined by the nature of the rights between the owner of the land and the party who is cultivating the crop. This problem has been first explored. In the remaining sections, consideration has been given to certain aspects of the rights of a crop mortgagee and a land mortgagee.

Rights of Lessor and Lessee

In any situation in which legal ownership is divorced from physical possession, there arise problems of the rights of the possessor as against the owner, the owner as against the possessor, and third parties as against either or both. Perhaps nowhere is this truism of more force than in the case of agricultural property. Frequently the party to whom possession is given (hereafter "cultivator") is an impecunious party with naught to offer but his labor, and the owner of the property (hereafter "owner") looks not to the cultivator personally, but rather to the fruits of the cultivator's labor for satisfaction of his right to a return from the land. As a result, the granting of possession to the cultivator will be attended with attempts of varying elaborateness to protect the owner's interest in the product of the soil. It is with the success of these attempts that this section is concerned.

The contract under which the cultivator enters the land of the owner may give rise to a bewildering variety of legal rights and obligations. Traditionally, these have been categorized into a few major relationships, and some relatively unimportant ones. The primary categories evoked by the courts have been the "landlord-tenant," "cropping contract," and "farming for shares." Some cases have suggested that it is possible to create a partnership between the owner and cultivator, and it has been occasionally held that the relationship was merely that of employer-employee. Assuming one of the primary relationships, there are terms which may be included in the contract giving the right of possession to the cultivator which purport to increase the owner's rights. These additional contract provisions may be lumped as "reservations of title," and "contracts to give a mortgage."
The California courts, in attempting to assess the rights arising out of the multiform contractual arrangements which can be made, have tended to approach the problem through use of these traditional categories. This approach is generally effective, but is subject to the inherent weakness of any categorization—there is a tendency to lose sight of the results which flow from the categories. This weakness is noticeable to some extent even in cases which involve similarly situated parties; it is especially so when a category which defines quite adequately the rights of parties *inter se* is stretched so as to determine the rights of third parties.

As noted above, the primary division which has been made between the contracts under which the cultivator holds possession of the owner’s land is that between “lease” and “cropping contract.” Under a lease, it is normally held that title to growing crops is in the lessee exclusively, and the right to possession of the land for the term of the lease is also in the lessee. Where an agreement is characterized as a cropping contract, the rights are not so clearly defined. Generally when the courts refer to a contractual arrangement as a cropping contract, they intend to find a tenancy in common in the crops—title in both lessor and lessee to an undivided interest—and no change in the right to the land, save insofar as the cultivator is entitled to possession to protect his interest in the crop. As a final confusing note, the same agreement may create different rights as to the land than it does as to the crops—*i.e.*, be a lease of land, but with the attributes of a cropping contract as to the rights in the crops. To avoid this confusion it is proposed to first consider the nature of the rights as between the parties, distinguishing between those cases involving the right to land and those involving the right to crops.

**Lease or Cropping Contract?**

In distinguishing between the lease and the cropping contract, certain cases are clear. Where the contract calls for a stipulated rental payment, in cash, there is but little doubt that the agreement is a lease. The difficult cases are those which involve a turning over—the word “payment” is avoided intentionally—by the cultivator to the owner of a share of the crops.

Early California cases considering the nature of the right in the crops created by an agreement to share the produce of the soil strongly favored

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8 See note 29 *infra*.
9 Harrelson v. Miller & Lux, Inc., 182 Cal. 408, 188 Pac. 800 (1920); Walls v. Preston, 25 Cal. 59 (1864).
10 Walls v. Preston, 25 Cal. 59 (1864); Adams v. Thornton, 7 Cal. Unrep. 219, 82 Pac. 215 (1905).
11 See text at note 25 *infra*.
12 See Ferguson v. Murphy, 117 Cal. 134, 48 Pac. 1018 (1897); Stockton Sav. & L. Soc. v. Purvis, 112 Cal. 236, 44 Pac. 561 (1896).
a categorization which would create a tenancy in common in the crops. *Bernal v. Hovious*,\(^1\) the first case to consider such an agreement, involved an agreement under the terms of which the owner was to provide seed, tools, and implements. The cultivator furnished his labor. The agreement then provided that the owner was to receive from the cultivator one-third of the crop, sacked, and free from expense of threshing. In holding that the relationship of the parties to the crop was that of tenants in common, the court said:\(^2\)

The true test seems to lie in the question whether there be any provision, in whatever form, for dividing the specific products of the promises. If there be, a tenancy in common arises, at least in such products as are to be divided.

This "true test" was followed in a series of later cases involving the right to the crops.\(^3\) But in *Clarke v. Cobb*\(^4\) a telling blow was struck for confusion. In this case, a purchaser of the land at a foreclosure sale and the mortgagor were contending for the share of the crops set aside by the tenant in possession as due under the terms of the agreement under which he held possession. The purchaser claimed them as rent of the property, due to him under section 707 of the Code of Civil Procedure,\(^5\) and, alternatively, that the interest of the mortgagor having been that of a tenant in common, that the entire interest passed to the purchaser at foreclosure sale, so that the mortgagor was entitled to none of the crop. The court held that the agreement between the mortgagor and the tenant in possession, even though calling for a turning over to the mortgagor of a share of the crops, was, in fact, a lease, and that the share of the crops due the mortgagor was merely a payment of rents due in kind. Rather than inferring a co-tenancy in the crops from the fact of the agreement's calling for a division of the produce, the court required that the agreement show in some way an intention to create that relationship. It might be noted on this point, that hitherto the agreement to share the crops had shown this intention. But no longer was this to be so, or so it appeared. Where the instrument as a whole more nearly resembles a lease than a contract to create a co-tenancy, it will be deemed a lease with rents payable in kind.

But two years later, in *Curtner v. Lyndon*\(^6\) the court reverted to the older rule. In point of fact, the decision did not even mention the basis for

\(^{13}\) 17 Cal. 541 (1851).

\(^{14}\) Id. at 546, quoting Putnam v. Wise, 1 Hill 235 (N.Y. 1834).

\(^{15}\) Woodsend v. Chatom, 191 Cal. 72, 214 Pac. 965 (1923); Jones v. Durrer, 96 Cal. 95, 30 Pac. 1027 (1892) (semble); Smith v. Schultz, 89 Cal. 526, 26 Pac. 1087 (1891) (semble); Howell v. Foster, 65 Cal. 169, 3 Pac. 647 (1884); Walls v. Preston, 25 Cal. 59 (1864).

\(^{16}\) 121 Cal. 595, 54 Pac. 74 (1898).

\(^{17}\) See discussion in text at note 152 infra (to be published in Vol. 10, No. 2).

\(^{18}\) 128 Cal. 35, 60 Pac. 462 (1900).
holding the particular instrument to be a "cropping contract." Rather, the reasoning of the court, in reaching the conclusion that an owner had disposed of any attachable interest in a crop being grown by a cultivator, was that the contract was a cropping contract, "therefore" the parties were tenants in common in the crop. To add confusion, this remark was supported by a citation to Clarke v. Cobb.

With this conflicting authority to choose from, it is little wonder that subsequent decisions have been divided as to the nature of the relationship between the parties as to the crop. While it appears today that the preponderance of authority is to the effect that a provision for a sharing of the crop is merely a stipulation for rent in kind, it should be noted that three of the cases so holding involve third parties who have damaged a crop, and who are seeking to reduce the damages collectible by the cultivator on the grounds that his interest in the crop is only that of a tenant in common. In one of the other cases so holding the point was conceded and in only one case is the point directly passed upon, and even in that case the court's comment might be construed as an alternate grounds for decision. On the other hand, the decisions holding the contract to be a cropping contract are with one exception not of much weight either; one of them reaching this conclusion and then holding that the rights of the parties were those of employer-employee, and another being of questionable precedent value. But in Woodsend v. Chatom there is a square holding indicating preference for the tenancy in common. It would seem that a fair statement of the situation is that the question is certainly open to argument, with the dictum favoring the "lease" construction, and the holdings favoring the "cropping contract" construction.

In analyzing the cases on this point, it is important to distinguish those which deal with the problems of the rights to the land on which the crop is grown, as opposed to the rights in the crops. This distinction was first pointed out in Walls v. Preston, an action in forcible detainer, in which the court held that the agreement between the owner and the cultivator, even

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19 See Wolfsen v. Hathaway, 32 Cal. 2d 632, 198 P.2d 1 (1948) (point assumed); Shintaffer v. Bank of Italy, 216 Cal. 243, 13 P.2d 668 (1932). See also cases discussed in notes immediately following.
25 191 Cal. 72, 214 Pac. 965 (1923).
26 25 Cal. 59 (1864).
though it created a tenancy in common in the crop, gave rise to the landlord-tenant relationship as to the land. This holding was followed for many years, again enduring until Clarke v. Cobb, in which case the rule was considered and rejected, the court insisting that the relationship was one of landlord-tenant in its entirety, and not merely as to the rights in land. Since Clarke v. Cobb was concerned with the rights in the crops, the rejection of the earlier rule is dictum, but certainly forcible. And, in Woodsend v. Chatom, which again involved rights in crops, the “better rule” was stated to be that of the earlier cases, Clarke v. Cobb being distinguished on its facts.

Effects of Categorization

With the exception of the situations in which the owner seeks to hold the cultivator to the duties of a tenant—i.e., impose a “lease” relationship upon him—the distinction between a cropping contract and a lease is not vital as between the parties. Whether the owner be a tenant in common in the crops, or a landlord seeking his rent, he is entitled to the contractually provided for share of the crops. It is with respect to the rights of the owner and cultivator against third parties that the distinction becomes most important, and it is for this reason that the confusion in the cases is most unfortunate. Where the only dispute is between the parties to an agreement, one may cast a pox on both their houses for failing to draw the agreement with greater precision, so as to avoid the difficulties of interpretation. Unfortunately, the categories which determine the rights as between owner and cultivator can have significant effects on the rights of third parties. Thus, if the agreement is termed a lease with rent payable in kind, the title to the crops is held to vest in the lessee. As a result, the crops are subject to whatever disposition he may make of them, prior to the lessor’s obtaining possession of his share. They may be sold or encumbered, leaving the lessor with a suit for the rent against his tenant. Or they may be attached by a creditor of the lessee—an even more unfortunate possibility, inas-

27 Jones v. Durrer, 96 Cal. 95, 30 Pac. 1027 (1892); Smith v. Schultz, 89 Cal. 526, 26 Pac. 1087 (1891).
29 Silveira v. Ohm, 33 Cal. 2d 272, 201 P.2d 387 (1949); Clarke v. Cobb, 121 Cal. 595, 54 Pac. 74 (1898); Stockton Sav. & L. Soc. v. Purvis, 112 Cal. 236, 44 Pac. 561 (1896); Blum v. McHugh, 92 Cal. 497, 28 Pac. 592 (1891); Farnum v. Hefner, 79 Cal. 575, 21 Pac. 955 (1889); Cox v. Miller, 15 Cal. App. 2d 494, 59 P.2d 628 (1936). See also cases cited and discussed in text and note at note 39 infra. In all of these cases involving retention of title by the lessor, the attempt is to circumvent this rule.
30 Lemon v. Wolff, 121 Cal. 272, 53 Pac. 801 (1898) (mortgage).
31 Crocker v. Cunningham, 122 Cal. 547, 55 Pac. 404 (1898); Stockton Sav. & L. Soc. v. Purvis, 112 Cal. 236, 44 Pac. 561 (1896); Blum v. McHugh, 92 Cal. 497, 28 Pac. 592 (1891) (semble).
much as this procedure does not even give the lessee a cash consideration against which the lessor can move. By the same token, they are immune from creditors of the lessor, and can be disposed of by him only in futuro—he cannot give good title as against one claiming under the lessee.\footnote{See generally, 14 CAL. JUR. 2d, Crops § 33 (1952).}

On the other hand, if the relationship is that of tenants in common, then neither party may sell the entire interest in the crop.\footnote{Woodsend v. Chatom, 191 Cal. 72, 214 Pac. 965 (1923) ; Baughman v. Reed, 75 Cal. 319, 17 Pac. 222 (1888).} If such a sale is effected, the party who made the sale and his vendee are converters of the undivided interest of the other co-tenant.\footnote{Woodsend v. Chatom, 191 Cal. 72, 214 Pac. 965 (1923).} A crop mortgage given by either of the co-tenants is effective as to only the interest of the mortgagor, giving the mortgagee a lien only on the undivided interest in the crops.\footnote{Acme Investment Corp. v. Thompson, 216 Cal. 335, 14 P.2d 87 (1932) ; Sunol v. Molloy, 63 Cal. 369 (1883). See Woodsend v. Chatom, supra note 34.} And the crops are subject to seizure on attachment in an action against either of the parties, but only to the extent of his undivided interest.\footnote{Sunol v. Molloy, 63 Cal. 369 (1883) ; see Curtner v. Lyndon, 128 Cal. 35, 60 Pac. 462 (1900).}

When such variegated results can ensue from a classification, it is indeed regrettable that one is unable with any assurance to determine just what the classification may be. Certainly no one’s interests are advanced by the uncertainty in the law. Encumbrancers and purchasers may rightly complain of the risks involved in taking a crop grown under an agreement susceptible to varying interpretations, with drastically different legal consequences. While the author’s personal preference is for the rule of Walls v. Preston—that an agreement giving the cultivator possession on shares creates a tenancy in common in the crop, with the rights to the land being in the nature of a leasehold—it is more important that there be a rule than that there be this rule.

"Secret Lien" Cases

In view of the fact that the agreements for change of possession of agricultural land are so often oral,\footnote{Sections 1091 of the CAL. CIV. CODE and 1971 of the CAL. CODE CIV. PROC. require a writing only for leases for a period of more than one year.} or at best informal unrecorded documents,\footnote{Section 1214 of the CAL. CIV. CODE requires recordation only if a lease is for a term of more than one year.} the uncertainties created by the confusion as to classification are even more glaring. Strangely enough, it is just this factor of informality and lack of recordation which has led to some of the most stringent rules favoring third parties, in what may be referred to as the “secret lien” cases. Basically, these cases involve attempts by an owner to provide himself with
some additional assurance that he will be able to satisfy his claim for the value of the use of his property out of the crops. Typically the device employed is either a retention of title of the entire crop in the owner or a covenant by the lessee to execute a crop mortgage to secure the rents due. As between the owner and the cultivator, of course, such a provision is effective to determine the rights. But the courts have shown an increasing reluctance to let the rights of third parties hinge upon such provisions.

The first California case to consider such a provision, *Wentworth v. Miller*, involved a simple clause under which the owner was to receive one-fourth of the crops as rent, with possession of the entire crop to remain in him until this share was paid over. The provision was upheld as against a purchaser from the lessee. In *Howell v. Foster*, a more elaborate clause was involved, the owner there retaining title to the entire crop, which was to be delivered in toto to him to be held as security for other advances. Upon satisfaction of the advances, three-fourths of the crop would be returned to the cultivator. Once more the provision was upheld.

But in *Farnum v. Hefner*, involving a clause providing for retention of title to the entire crop in the owner, and requiring delivery in toto to the owner, who would upon receipt immediately return two-thirds to the cultivator, it was held that a purchaser of the cultivator's interest in the crop became an involuntary assignee to the two-thirds share to be given the cultivator, despite a prohibition on disposal or encumbrance. The court severely restricted *Howell v. Foster* by distinguishing it on two grounds: (1) that there was consideration for the retention of title in that case, in that it was to protect the owner for other advances; and (2) that the rule of that case was not applicable where the owner was to redeliver immediately to the cultivator. And in *Blum v. McHugh*, even more serious doubt was cast on the efficacy of a clause reserving title in the owner to secure

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39 Crocker v. Cunningham, 122 Cal. 547, 55 Pac. 404 (1898); Ferguson v. Murphy, 117 Cal. 134, 48 Pac. 1018 (1897); Marshall v. Luiz, 115 Cal. 622, 47 Pac. 597 (1897); Stockton Sav. & L. Soc. v. Purvis, 112 Cal. 236, 44 Pac. 561 (1896); Blum v. McHugh, 92 Cal. 497, 28 Pac. 592 (1899); Farnum v. Hefner, 79 Cal. 575, 21 Pac. 955 (1899); Hitchcock v. Hasset, 71 Cal. 331, 12 Pac. 228 (1886); Howell v. Foster, 65 Cal. 169, 3 Pac. 647 (1884); Wentworth v. Miller, 53 Cal. 9 (1878); Tuoby v. Wingfield, 52 Cal. 319 (1877) (wool).
41 Summerville v. Stockton Milling Company, 142 Cal. 529, 76 Pac. 243 (1904); Lemon v. Wolff, 121 Cal. 272, 53 Pac. 801 (1898); Marshall v. Luiz, 115 Cal. 622, 47 Pac. 597 (1897); Hitchcock v. Hasset, 71 Cal. 331, 12 Pac. 228 (1886); Howell v. Foster, 65 Cal. 169, 3 Pac. 647 (1884); Wentworth v. Miller, 53 Cal. 9 (1878); Tuoby v. Wingfield, 52 Cal. 319 (1877); Cox v. Miller, 15 Cal. App. 2d 494, 59 P.2d 628 (1936).
42 53 Cal. 9 (1878).
43 65 Cal. 169, 3 Pac. 647 (1884).
44 79 Cal. 575, 21 Pac. 955 (1889).
45 92 Cal. 497, 28 Pac. 592 (1891).
cash rentals, when the court referred to the interest of the owner as "ownership or a lien."

Then, in *Stockton Sav. & L. Soc. v. Purvis*, again involving retention of title until delivery of the crop by the cultivator to the owner, it was held that such a provision was a mere attempt to create a secret lien on personal property, which was void as against creditors of the cultivator. But *Howell v. Foster* was excluded from the "secret lien" rule, on the grounds that the rent there was payable in kind. This decision was followed by a series of cases expanding on the theme, each one pushing the boundary of permissible clauses a bit further back. Finally, in *Crocker v. Cunningham*, involving a retention of title clause in an agreement calling for a division of the crop, the court indicated that *Howell v. Foster* was in serious doubt, by holding the retention provision invalid.

In *Summerville v. Stockton Milling Company*, the court indicated that its objection to the retention of title in the owner was solely based on the "secret lien" theory when it upheld such a provision in a lease which had been recorded before the adverse claimant obtained his rights. Subsequent cases, with but few exceptions, have continued the same line of reasoning.

The only cases indicating the possibility of a different result have been extremely weak. One of them, *Tuohy v. Linder*, involved a chattel mortgagee under the cultivator, who sought to protest the owner's right without first seeking to foreclose his mortgage, or otherwise prove a right to possession. In giving judgment for the owner, the court based its decision on the failure of the mortgagee to show any right to the crop, but indicated a possible return to the older rule, citing *Howell*. And in *Gates v. Quong*, the court, although conceding the point, questioned whether a cultivator in possession under an agreement giving the owner the full right to direct sale of a crop, had any mortgagable interest in the crop.

Another form of agreement, less frequently encountered, is one providing that the cultivator will execute, in favor of the owner, a crop mortgage to secure the payment of cash rentals. One case held that mere knowledge of the existence of a lease does not put a third party on notice of such an unusual agreement, but in a later decision it was held that one with actual notice of such a provision is bound by it, inasmuch as the provision is in the nature of an equitable lien on the crop.

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46 112 Cal. 236, 44 Pac. 561 (1896).
47 122 Cal. 547, 55 Pac. 404 (1898).
48 142 Cal. 529, 76 Pac. 243 (1904).
49 144 Cal. 750, 78 Pac. 233 (1904).
50 3 Cal. App. 443, 85 Pac. 662 (1906).
51 Wilkerson v. Thorp, 128 Cal. 221, 60 Pac. 679 (1900).
Thus, the California courts have been quick to strike down any attempts to obtain an advantage for the owner at the expense of third parties without notice of peculiar provisions in the agreements under which the cultivator takes possession. Why this same solicitude has not been shown those who are asked to determine the nature of an ambiguous agreement is not clear. It can only be hoped that this same philosophy will be carried into effect in the categorization problems, so that third parties, with bona fide claims against crops, will be able to know exactly what the nature of the rights they have succeeded to may be. Only through affording this certainty will the courts achieve the desired end of promoting the fullest development of the agricultural potential.

Creation and Extinction of the Crop Mortgage Lien

Prior to the adoption of the Code of 1872, crop mortgages were created through compliance with the formalities required to create a mortgage of real property. The lien of the mortgage existed only until the crop was harvested, after which it was terminated unless there was an immediate delivery to the mortgagee. Such is no longer the case. Today, the creation and extinction of crop mortgages is a unique problem, most closely resembling the problems of chattel mortgages generally, but still involving problems arising as a result of the older rules and the reasons which led to those rules.

Section 2955 of the Civil Code provides the exclusive means for the creation of a valid crop mortgage—or so it has been said in many cases involving the effectiveness of a land mortgage as creating a lien on growing crops. More precisely, a crop mortgage, to be effective as against third parties must comply with the statutory formalities required for any chattel mortgage, and be recorded as a crop mortgage. As between the parties, however, any documents which indicate an intent to secure a debt by hypothecation of a crop will be effective to give the creditor rights against the debtor as to that crop. But a land mortgage, even with a rents and profits clause, does not create any lien on growing crops, as between the parties or as against third parties even though they may have notice of the land mortgage, for “no amount of notice can make the real estate mortgage a crop mortgage.” On the other hand, a mortgage executed and recorded as a crop mortgage, which contained a provision that the real estate de-

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54 See Simpson v. Ferguson, 112 Cal. 180, 40 Pac. 104 (1896).
57 Modesto Bank v. Owens, 121 Cal. 223, 53 Pac. 552 (1898).
scribed therein was also made security for the debt, was effective to create a lien on the land as between the parties and third parties with notice. 58

Most of the incidents of the crop mortgage are those common to all chattel mortgages. 59 Thus, delay in recordation of the crop mortgage gives all creditors who obtain a lien during the period of delay priority over the crop mortgage, and additionally gives priority to any creditor whose claim arose during the period of delay, even though he obtains his lien after recordation. 60 The right of possession of the crop mortgagee, absent some expression in the contract fixing it expressly, is deemed to accrue when the debt becomes due, 61 and the mortgagee is then entitled to take possession without foreclosure of the debt. 62 These problems, however, are not within the scope of this paper; rather attention will be focused on the specific problem of termination of the crop mortgagee's rights through removal of the crop from the property of the mortgagor, as provided for in Section 2972 of the Civil Code.

As noted above, the rule under the Practice Act of 1856 was that the lien of a crop mortgage was terminated upon severance of the crop—more specifically, at the time the crop was in a deliverable state—unless the crop was delivered immediately to the mortgagee. 63 Under this rule, there could be but little doubt as to whether or not the mortgagee had a lien on the crop—if it were cut and in a deliverable condition, he did not. From the moment the crop was in a deliverable condition, it could be disposed of to anyone, and the mortgagee would have no claim against the taker; the mere fact that the crop had been removed from the land of the mortgagor would be conclusive of the extinguishment of the lien. 64 The mortgagee, to protect his interests, had to make certain that he received immediate delivery of the crop after harvest. Recordation of the mortgage would protect the mortgagee while the crop was still part of the land, but as soon as an actual change of possession—as opposed to the constructive change accomplished through recordation—was possible, it had to be effected, at risk of loss of the lien. By thus putting the burden of obtaining possession upon the mortgagee, considerable protection was afforded the innocent purchaser.

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60 Ruggles v. Cannedy, 127 Cal. 290, 55 Pac. 911 (1899) is the leading case in this area.
63 Goodyear v. Williston, 42 Cal. 11 (1871).
of a crop, who could rely on receiving the crop free from any adverse claims merely by force of the fact that it was capable of being delivered to him.

But in 1878, with the enactment of Section 2972 of the Civil Code, a change was made in the law, giving to the mortgagor a significant additional protection, the section providing that: “The lien of a mortgage on a growing crop continues on the crop after severance, whether remaining in its original state or converted into another product, so long as the same remains on the land of the mortgagor.” The mortgagee was now protected from those who sought to assert adverse claims to the crop while it remained on the land of the mortgagor prior to delivery. Thus, the attaching creditor of the mortgagor would be unable to levy upon the crop while it remained on the land. Priority was assured the crop mortgagee, contingent upon the good faith of the mortgagor in not removing the crop. To a large extent, this priority of right is the foundation of the entire law of security transactions. Creditors may be willing to rely on the honesty of debtors, but wish protection from the insolvency of the debtor. Section 2972 provides just this assurance of priority, although apparently leaving the mortgagee at the mercy of the unscrupulous mortgagor who would remove the crop for the purpose of selling it to a third party, in derogation of the mortgagee’s rights. But surely this is one of the risks which any creditor must always take—that of dishonesty on the part of the debtor. No more can be asked of the law than that it insure against the hazards of economic adversity through granting of priority to one creditor against others.

But the fact that the 1878 amendment was a significant expansion of the mortgagee’s rights to a crop seems not to have deterred the courts in their interpretation of the section so as to provide a protection far greater than that which could be imagined from a literal reading of the statute. The law today, as it has been developed in the case by case search for the most equitable result in the specific instance, is concerned not with the question suggested by the statute: “Is the crop still on the land of the mortgagor?” but rather, with the question “Was the removal of the crop accomplished in such a fashion as to justify protecting the mortgagee, to the detriment of those who have taken the crop?”

Statutory Background

An understanding of the law surrounding the problems of termination of the lien of a crop mortgage requires consideration of four Civil Code sections:

3440—Establishing a conclusive presumption that every lien on personal property made by one in possession and not followed by
an immediate change of possession is void as against the transferor's creditors while he remains in possession, and as against any purchaser or encumbrancer in good faith subsequent to creation of the lien, except liens created by mortgages allowed by law (among other exceptions). 65

2957—Rendering void as against creditors of the mortgagor and subsequent purchasers and encumbrancers of the property in good faith and for value, any mortgage unless recorded. 66

2972—Providing that the lien of a mortgage on a growing crop continues on the crop after severance, whether remaining in its original state or converted into another product, so long as the same remains on the land of the mortgagor.

2973—Providing that mortgages of personal property not subject to mortgaging under the code, and mortgages not made in conformity with the provisions of the code are nevertheless valid between the parties, their heirs, legatees, personal representatives, and persons who, before parting with value, have actual notice thereof.

Unfortunately, the code sections have been important more in their absence than their presence in the reported decisions. Rather, the case law has developed about a group of doctrines which purport to interpret the language of Section 2972, without reference to any of the other applicable code provisions, and without distinguishing the various factual situations which may arise. To facilitate analysis of the problems involved, it is proposed herein to consider the effect of removal of the crops from the land of the mortgagor in each of five basic fact situations, looking both to the results of the cases to date, and suggesting alternative analyses based upon the statutory scheme. A crop on the land of a mortgagor may be removed in any of the following ways: (1) By one who has no claim of right to the crop from either the mortgagor or mortgagee; (2) by one claiming through the mortgagor, either by sale or on attachment under an action against the mortgagor on a debt; (3) by the mortgagor himself, acting in derogation of the rights of the mortgagee; (4) by the mortgagor, acting under instructions from the mortgagee; (5) by the mortgagee.

Early cases, involving simple factual situations followed the literal language of the code to hold that an attaching creditor obtained no rights

65 Section 3440 was altered substantially in 1951, but its impact for present purposes is the same in both pre- and post-1951 versions.

66 In 1946 a provision voiding crop mortgages on crops to be harvested more than 12 months after the date of the mortgage, executed by a tenant unless the tenant held under a recorded lease referred to in the mortgage, was eliminated from the section.
in a crop while still on the land of the mortgagor, but that an attaching creditor who levied on a crop three miles off the land of the mortgagor obtained rights superior to those of the mortgagee.

**Removal of crops by one having no rights thereto**

*Martin v. Thompson,* the first of the cases to consider critically the language of Section 2972, involved a type (1) situation, in which the removal of the crop was by one without any rights thereto. The actual issue in the case was the right of a crop mortgagee to intervene in an action between a landowner and the crop mortgagor who had grown the crop while in adverse possession of the land. The landowner had taken possession of the crop immediately after harvest, and then brought action to determine his rights in the crop. Mortgagee was denied a right to intervene. In an appeal on the principal action, it was held that the adverse possessor—the mortgagor—had the prior right in the crop as against the landowner. In the subsequent appeal from the denial of the petition to intervene, it was held that the mortgagee was entitled to intervene, inasmuch as his right in the crop was superior to that of the mortgagor, and that the case was one in which intervention was clearly appropriate. The court, considering the effect on the rights of the mortgagee of the removal of the crop from the land by the landowner noted that the statutes furnished no protection against an invalid mortgage to those who took mortgaged property without any claim of right, applying, rather, to creditors and bona fide purchasers and encumbrancers. Since the landowner did not fall within any of these classes, there seemed to be no valid reason for holding that Section 2972 required termination of the mortgage lien in his favor. A fair restatement of the holding of the case would seem to be that the provision of Section 2972, extinguishing the lien of a crop mortgage upon removal of the crop from the land of the mortgagor, was not to be invoked in favor of one who was not protected by the general provisions as to validity of a defective chattel mortgage. The question is not so much that of termination of the lien, as that of who is able to claim the benefits of the statute.

Analytically, this reasoning would appear to be sound. Unfortunately later courts, in applying the *Martin* rule have ignored the factual situation which led to the language in the opinion about wrongful taking, and attempted to weave the law around the concept of “wrongful removal” in the abstract. There has been no other case found dealing with a removal by

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68 Waterman v. Green, 59 Cal. 142 (1881).
69 63 Cal. 3 (1883).
70 Martin v. Thompson, 62 Cal. 618 (1882).
one without a claim against either mortgagor or mortgagee, but the courts have continued to talk about wrongful removal, without recognizing that the original use of the term was in the context of "a removal by one who, because he has no rights in the crop, is not protected by the statutes dealing with protection from invalid mortgages." It should be constantly borne in mind, in considering the later cases in this area, that the original—and it is suggested, the correct—application of the "wrongful removal" doctrine led to departure from the literal language of section 2972 not on the basis of the nature of the taking, but the nature of the taker.

Removal by One Claiming Under Mortgagor

In situation (2) cases, in which the crop is removed from the land by one who claims under the mortgagor, as by sale or attachment, the term "wrongful removal" or "tortious removal" has been employed to explain decisions granting the mortgagee a right of recovery. These cases have developed on the theory that the lien of the mortgage was not extinguished because of the nature of the acts leading to the taking of the crop. Thus, in Wilson v. Prouty,72 the forerunner of the situation (2) cases, an action was brought by the mortgagee against one who had purchased from the mortgagor and removed the crops from the land under the sale agreement. The court felt that the taking was tortious, since the purchaser had constructive notice of the mortgage lien when he took the crops. Inasmuch as the taking was tortious, it was felt that Martin v. Thompson required a holding that the lien of the mortgage was not extinguished, and the mortgagee was awarded judgment. Later cases73 have followed the Wilson rule, uniformly holding that one who enters the land of the mortgagor and removes a crop under an agreement with the mortgagor, is liable to the mortgagee, on the theory that the tortious removal does not extinguish the lien.

While the result of these cases is unexceptionable, the reasoning employed in reaching the position is clearly contrary to the statutory language. There can be no question but that the lien of the mortgage is extinguished under the statute. To illustrate the point, consider the rights of a purchaser from the one who originally removed under the contract with the mortgagor. Would this sub-purchaser be subject to the rights of the mortgagee? It seems difficult to believe that such a result could pertain.74 If the original taking does not extinguish the lien, however, how is it to be extinguished? To answer, as some of the later decisions in other factual situations appear to have, that the later bona fide purchaser is not bound

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72 70 Cal. 196, 11 Pac. 608 (1886).
73 Sousa v. Lucas, 156 Cal. 460, 105 Pac. 413 (1909); Bank of Woodland v. Duncan, 117 Cal. 412, 49 Pac. 414 (1897); DeCosta v. Comfort, 80 Cal. 507, 22 Pac. 218 (1889).
74 But see text at note 78 infra.
by the original tortious removal is simply to restate the true rule of the Martin case—that the lien is extinguished as to protected classes, but that the original taker cannot assert this extinction of the lien because he does not fall within one of these classes. It would be far sounder to recognize the actual legal consequences of the purchase of the crops on the land of the mortgagor, which, by normal principles would involve an assumption of the mortgage debt implied in law through the force of the constructive notice given by recordation of the mortgage. The mortgagee is then entitled to pursue the crops in the hands of the original purchaser on the basis of this undertaking; and the original purchaser cannot assert as a defense to such an action that the lien was extinguished through removal from the land, for he is not a protected claimant under the code. But the lien is extinguished, and subsequent takers without actual notice—there no longer being any basis for constructive notice—can assert the removal as terminating the lien.

Whether this rationale will ever be adopted is open to question. The doctrine of tortious removal is firmly imbedded in the law of California, as witness DeCosta v. Comfort. In this case the original purchaser from the mortgagor made an express assumption of the mortgage obligation, promising to pay off the mortgage debt, and apply the balance of the proceeds of sale of the crops to other debts of the mortgagor. But the court nonetheless dwelt upon the "tortious" nature of the removal in holding him liable to the mortgagee for the proceeds of sale to the extent necessary to satisfy the debt. The undertaking to pay the mortgage debt was only incidentally mentioned in the opinion as lending added weight to the tortious removal theory.

**Removal by Mortgagor**

The type (3) cases, involving removal by the mortgagor himself, without consent of the mortgagee, have also leaned heavily upon the doctrines of "tortious removal," with the results dependent upon whether or not the removal was so classified. But again, in only one instance has there been any possible difference between application of this theory and that of the more precise rule of Martin v. Thompson.

These cases generally involve a removal by the mortgagor, followed by a sale to a third party, after which the mortgagee seeks to assert his lien on the crops in order to recover from the third party. The first of the series, Chittenden v. Pratt, involved a disposal by the mortgagor to one with actual notice of the mortgagee's rights. In rendering judgment for the

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76 Jones, Chattel Mortgages § 454 (Bower ed. 1933).
78 80 Cal. 507, 22 Pac. 218 (1889).
77 89 Cal. 178, 26 Pac. 626 (1891).
mortgagee, the court held that since the defendant had actual notice of the mortgage, and knew that the lien could not be divested by a wrongful removal, his taking of the crop from the mortgagor was wrongful, and in the nature of a conversion. In California Packing Corp. v. Stone\textsuperscript{8} a finding that the mortgagor had "wrongfully and tortiously removed" crops from his land was sufficient to lead to affirmance of a judgment against one who had taken from the mortgagor, in an opinion which does not indicate whether or not the taker from the mortgagor had notice of the mortgagee’s rights.

If these cases represented the law, it would be clear that a substantial injustice was being done to all who purchase crops. If the conversion language of Chittenden is taken at its face value, it would seem that any person who thereafter bought the crop would be liable to the mortgagee. Bona fides would be no defense to the action in conversion, under normal principles of tort law.\textsuperscript{7} And the California Packing decision would indicate that we look not to the nature of the act of the purchaser from the mortgagor, but rather to the nature of the acts of the mortgagor himself in effecting the removal.

Other cases, however, indicate a contrary result. While they are logically indistinguishable if we assume the "tortious removal" rationale, it is suggested that the distinction drawn by this article, based on the Martin v. Thompson rule will serve to reconcile them. Thus, in Horgan v. Zanetta,\textsuperscript{80} where the mortgagor, during harvest, removed the crops as severed to the land of the defendant, who at the time of removal had no actual notice—although note that he must have had constructive notice—of the mortgagee’s rights, it was held that a later attachment by the defendant was valid as against the mortgagee, even though defendant had meanwhile gained actual knowledge of the mortgagee’s rights. On the basis of the facts in the other "mortgagor removal" cases, there is simply no basis for distinguishing the acts of the mortgagor. The removal was no more and no less tortious in this case than in any other case, yet the court held that where the one with whom a crop is stored does not know of the existence of a mortgage, then the mortgagor’s removal extinguishes the lien on the crop. A result similar in essence, although based on a theory of "estoppel" was reached in a later case.\textsuperscript{81} An even more significant inroad on the "tortious

\textsuperscript{78} 64 Cal. App. 488, 222 Pac. 103 (1923).
\textsuperscript{79} 91 Cal. App. 738, 267 Pac. 746 (1928).
\textsuperscript{80} Pacific Fruit Exchange v. F. E. Booth Co., 103 Cal. App. 54, 283 Pac. 944 (1930).
removal" doctrine as applied to the type (3) cases is the rule that removal creates a prima facie case that the lien has been extinguished, which the mortgagee must overcome through proving the tortious nature of the removal in order to assert his lien. Just what the nature of the mortgagee's proof would have to be has never been made clear, although the fact that this doctrine has not been invoked in favor of takers with notice, but has been used in cases in which the taker was a bona fide purchaser may indicate the result which is obtained through use of this pleasant little fiction.

This series of cases probably demonstrates better than any other the inadequacy of the "tortious removal" doctrine. In attempting to apply it, the courts have been forced to all manner of countervailing rationalizations, when the basic test of the Martin case would serve to provide ready answers, without resort to additional fictions. The removal clearly defeats the lien as against protected claimants. The only source of inquiry should be whether the possessor of the crop against whom the mortgagee seeks to assert his rights is within the protected classifications. If the defendant obtained his rights in the crop after removal from the land, and before gaining knowledge of the interests of the mortgagee, he should be protected. But if he is a purchaser or encumbrancer with actual notice, or a creditor who gained his rights after acquiring notice of the mortgagee's rights in the crop, then there is no basis in the code for offering protection.

**Removal by Mortgagor at Instance of Mortgagee**

Another series of cases which has presented considerable difficulty is that dealing with the rights following removal by the mortgagor at the instance of the mortgagee—situation (4). Here the courts have struggled with a variety of conflicting doctrines, including tortious removal, waiver, and "substitution of personal obligation." The basic factual situation is simple: Following harvest, mortgagee instructs mortgagor as to disposition of the crop. But there are sixteen possible combinations. The instructions may be to store or to sell, to either a specified party or at the mortgagor's discretion. The mortgagor may comply with the instructions or ignore them. And the person to whom sold, or with whom stored, may or may not know of the mortgage. While only a sampling of these situations is afforded by the cases, sufficient confusion has been engendered to render the paucity of authority not altogether unfortunate.

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82 Ramsey v. California Packing Corp., 51 Cal. App. 517, 201 Pac. 481 (1921) (citing Horgan v. Zanetta, note 80 supra, and Gates v. Quong, 3 Cal. App. 443, 85 Pac. 662 (1906) (involving a rightful removal by a third party)).

Byrnes v. Hatch\(^{84}\) hinted at a possible rule in favor of the mortgagee, in a totally irrelevant dictum, when it was said that the fact that a crop was hauled to a warehouse at the direction of the mortgagee may have been sufficient to preserve the lien of the mortgage. It was later said\(^{85}\) that this rule was brought to flower by Campodonico v. Oregon Improvement Co.\(^{86}\) The basis for such a statement is open to question. In the Campodonico case, an action in conversion was brought against a warehouseman, based on allegations that the crop as to which plaintiff mortgagee claimed a lien, had been shipped under instructions for storage in the name of the mortgagee. The warehouseman, despite repeated demands for issuance of receipts in the name of the mortgagee, persisted in issuing them to the mortgagor. The crops were attached, and soon thereafter the mortgagor became insolvent. Affirming judgment for the mortgagee, the court held that the lien of the mortgage was not lost through the neglect of the warehouseman to issue a proper receipt for the crops. But this holding seems truly irrelevant to the decision. The question of whether or not the lien persisted might better have been determined in an action by the mortgagee against the assignee in bankruptcy. In the action against the warehouseman for conversion, the only issue is whether there was such a substantial interference with the rights of the mortgagee as to entitle him to recovery of the value of the crop.\(^{87}\) Clearly there was.

But the theory that the mortgagor can be constituted the agent of the mortgagee for the handling of the property after removal from the land seems firmly embedded in the case law in this field, despite the repugnance to such transactions when a conveyance is being attacked as fraudulent.\(^{88}\) Following this theory, the removal of the crop by the mortgagor is, in effect, a removal by the mortgagee, which gives rise to a new possessory lien in behalf of the mortgagee.\(^{89}\) And yet, despite the broad language of the opinions, it appears that the actual decisions are of rather narrow scope. In Gower v. Bertrand,\(^{90}\) mortgagee sought recovery of funds held by defendant, to whom mortgagor had delivered his entire crop under an agreement to sell entered into before the mortgage. Defendant claimed a right to the funds for repayment of advances to mortgagor made before and after the execution of the mortgage, and before and after notification by mort-

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\(^{84}\) 77 Cal. 241, 19 Pac. 482 (1888).
\(^{86}\) 27 Cal. 566, 25 Pac. 763 (1891).
\(^{87}\) Prosser, Torts 74 (2d ed. 1955).
\(^{89}\) See note 100 infra.
\(^{90}\) 44 Cal. App. 233, 186 Pac. 172 (1919).
gagee of his claims thereunder. The trial court gave judgment to mortgagee for the proceeds of the sale of the crops, but permitted defendant to deduct for amounts advanced prior to receiving notice of the fact that mortgagor was shipping on mortgagee's behalf. On appeal, the judgment was affirmed, the court following the rule that shipment on behalf of the mortgagee preserves his lien. But if this is truly the rule, it seems difficult to justify permitting the defendant to retain advances made before receiving notice that shipments were made on behalf of the mortgagee. The result would seem to support the position that the lien was destroyed by removal as to those who had parted with value prior to notice of the mortgagee's rights. But the court espouses the opposite rule.

In *Campodonico v. Santa Maria B. & G. Co.*, recovery was permitted against one who had purchased from the mortgagor following removal and storage in mortgagor's name, on a showing that the mortgagee had instructed the mortgagor to store the crop in his (mortgagee's) name. Reverting to the "tortious removal" rationale, the court states that removal under instructions from the mortgagee, where the mortgagor wrongfully puts the property in his own name does not act to end the mortgagee's lien on the crop. But the action here was against a purchaser from the mortgagor with notice of the claims of the mortgagee, or so it would seem. The court notes that the purchaser had both actual and constructive notice of the mortgage; the constructive notice suggestion would tend to support the position that the lien was actually saved, but certainly it is not necessary to the decision, inasmuch as there was actual notice.

Following the agency theory and the tortious removal theory to their logical conclusions would lead to preservation of the lien in every case of removal by the mortgagor. If he adheres to the mortgagee's instructions, he acts as agent, creating a possessory lien. If he disobeys, he acts tortiously, and this preserves the lien.

The more recent cases have reached an opposite result, on the doctrine of "waiver." In distinguishing the *Campodonico* line of cases, emphasis has been placed upon the fact that in them the instructions from the mortgagee to the mortgagor were specific—*i.e.*, sell the crop to Joe Vendee, whereas the instructions in the case being considered are general—*i.e.*, sell the crop. It would seem that the logical distinction between the two situations is somewhat ephemeral. To say that the mortgagee who instructs his mortgagor to sell to, or store with, a specific party is constituting the mortgagor his agent, whereas the mortgagee who instructs the mortgagor merely

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to sell, or to store, is waiving his lien on the crop, reads far more into a verbal distinction than is warranted. Occasionally this "reasoning" is buttressed by reflections on the tortious removal theme, with the courts saying that removal in cases in which the mortgagor complies with the instructions has been consented to, and is therefore not tortious, so that the lien is ended, at least if the instructions are general; but that where the removal is made in a manner other than that instructed—normally, where the mortgagor stores in his own name after having been instructed to store in the name of the mortgagee—that it is tortious, and that the lien endures. The net result of all of this language, taken at face value, would be that the lien is preserved only if the instructions are specific and the mortgagor disobeys them. Where instructions are general, or where the mortgagor complies with them, the lien is lost.

A similar but clearly distinguishable problem should be noted here. Assuming that the mortgagee has a claim against the warehouseman or purchaser, what are his rights as against other creditors of the mortgagor, following sale of the crop? If the purchaser has not yet paid the price to the mortgagor, may the mortgagee claim priority as to the amount due, or is it subject to attachment by general creditors? The rule applicable to such situations was clearly stated in Maier v. Freeman to be that the lien of the mortgage does not extend to the proceeds of sale of the crop. Despite this holding, occasional cases appear to give the mortgagee the prior right to the proceeds on the agency theory.

One of the few cases which clearly presented this problem was that of McIntyre v. Hauser, an action by an attaching creditor against one who had purchased mortgaged property under an express agreement providing that the price due was to be paid to the mortgagee. It was held that the agreement under which the property was acquired gave the mortgagee a direct right to the proceeds, with no attachable interest remaining in the mortgagor. The court is careful to distinguish the case in which the claim of the mortgagee is based solely upon his lien, noting that the sale of the property obviously gives no rights as to the price due. The importance of the McIntyre case lies in the most unusual factual situation there involved, and the fact that the court specifically relied, not on the mortgage lien, but

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93 See cases cited in note 92 supra.
95 112 Cal. 8, 44 Pac. 357 (1896).
97 131 Cal. 11, 63 Pac. 69 (1900).
on the implied assignment of the debt due the mortgagor, or, alternatively, a third party beneficiary theory. When, in Consolidated Produce Co. v. Takahashi, it was said that "Under certain circumstances the mortgagee may claim the proceeds from a wrongful sale," citing McIntyre, it would seem that it was rather severely restricting the earlier cases implying some special claim to the price due on a sale of crops by the mortgagor under instructions from the mortgagee.

Under the Martin v. Thompson rationale, it is apparent that the cases involving removal under instructions should be judged by the same standards as those involving removal on the mortgagor's own initiative. Certainly the agency rationale, where there is no evidence of knowledge to third parties of this relationship, are directly opposed to the cases interpreting section 3440. The appropriate inquiry should be directed toward notice. The removal has terminated the lien of the mortgage as against all protected classes of adverse claimants. The doctrine of waiver is an independent one, and should not be injected into determination of whether the mortgagee may otherwise assert his lien against the crops.

Removal by Mortgagee

The type (5) situations have involved little difficulty. Where the mortgagee himself takes possession of the crop on the land of the mortgagor and removes it for storage and/or sale, it seems reasonably clear that the rights of the mortgagee should be superior to those of anyone claiming under the mortgagor. This is the very transaction which the codes, by indirectness, contemplate. Upon harvesting, the mortgagee will take possession of the crop and convert his lien which had hitherto existed by virtue of the recordation of the mortgage into a possessory lien. And this is the result which the cases have consistently reached.

It is the position of the author that the doctrine of tortious removal has no place in the law of security transactions involving crops. As has been suggested above, the statements in the cases to the effect that a removal is or is not tortious, and that certain legal consequences follow therefrom, are merely expressions of a result. Unfortunately, the courts continue to attempt to cope with this meaningless term, and to rationalize results through ignoring the logically inevitable consequence of the doctrine, which would require that once a taking is wrongful, the crop may be traced into the

99 See note 90 supra.
hands of whomsoever has acquired it, without regard to notice or good faith. Despite these shortcomings, it was said in *Valley Bank v. Hillside Packing Co.*\(^1\) that:\(^2\)

> It follows logically that if the crop happen to be removed through no act or permission or carelessness of the mortgagee it has been removed tortuously and, therefore, no legal rights should be gained or lost through such act. [And it] follows that the rights of creditors of the mortgagor and purchasers subsequent to removal should not be inferior to the lien if the crop has been removed through consent or lack of reasonable diligence of the mortgagee to protect his interest after harvest.

Finally, in adverting to the cases involving removal by the mortgagee, the court notes that the mortgagor's removal of the crops without consent would be tortious, but that if removed with consent the lien would be lost. This explains, it is stated, the holding that if the mortgagee himself takes possession after harvest and removes the crop, the actual possession succeeds the symbolic possession of recordation, and "the lien is not to be distinguished (sic)."\(^3\) This discussion appears to ignore the problem of removal with consent of the mortgagee in those cases in which the mortgagor disobeys instructions. Nor does it successfully explain why consent to removal should, in cases in which instructions are specific, constitute the mortgagor an agent, but in cases where they are general, "substitute the personal obligation of the mortgagor."

If the development of the law is to be accomplished through manipulation of the requirements for finding a removal "tortious" or "consented to," no real harm is done, so long as the courts are careful to take note of the unexpressed elements of notice and good faith. But it can hardly be said that the *Valley Bank* rationale provides a sound or equitable basis for determining the rights of various parties in a crop. Under this rule the housewife purchasing produce at a market is liable to the mortgagee in conversion, if the mortgagee can show that he exercised the required degree of care in protecting his rights following harvest. Such a result, logically inescapable under this theory, provides its own answer.

Fortunately there is authority, although of questionable value, which considers the problem of notice in its relationship to the doctrine of tortious removal. *Ramsey v. California Packing Corp.*\(^4\) was an action by a mortgagee against a purchaser without actual or constructive notice of the

\(^1\) 91 Cal. App. 738, 267 Pac. 746 (1928).

\(^2\) Id. at 740-41, 267 Pac. at 747, citing Horgan v. Zanetta, 107 Cal. 27, 40 Pac. 22 (1895).

\(^3\) See note \(^8\) supra.

\(^4\) 91 Cal. App. at 741, 207 Pac. at 747. It is assumed the court means "extinguished." If the word "distinguished" was purposefully used, the possibilities are intriguing.

\(^5\) 51 Cal. App. 517, 201 Pac. 481 (1921).
mortgage lien. It was held that the rights of the purchaser were superior to those of the mortgagee, on the grounds that the mortgagee had not overcome the prima facie case of extinguishment arising from removal. Insofar as this is the entirety of the holding, it adds but little to the protection afforded innocent purchasers. But there is language in the opinion recognizing expressly these rights. The court, emphasizing that there was no notice of the mortgage because of faulty recordation, categorized the defendant as a bona fide purchaser, who would not, it was said, be bound by a tortious removal. It is indicated that there are two elements involved in asserting the mortgagee's rights to the crop: He must show that the removal was unconsented, and also show connivance or knowledge on the part of the purchaser. The California Supreme Court, in denying review, expressly refused to pass on the language regarding the effect of faulty recordation, basing its affirmation on the failure to show that the removal was tortious.

Ramsey is the only case which has expressly recognized the difference between one with and one without notice, except insofar as knowledge makes the removal tortious where the removal is made by one claiming under the mortgagor. Rather, the cases have emphasized the nature of the act of removal in determining the rights of the mortgagee. As pointed out above, the results of the cases have not been, to the most extent, different than they would had the words of the statute been applied as originally suggested in Martin v. Thompson. Until the courts recognize the potential of their decisions emphasizing the nature of the removal, and turn their attention to the status of the adverse claimant, there remains the danger of a real subversion of the statutory scheme of protection.

105 Id. at 521, 201 Pac. at 482.

106 See California Packing Corp. v. Stone, 64 Cal. App. 488, 222 Pac. 193 (1923), the only case in which it appears that the result may actually have been contrary to that which would have been reached under the theories advanced herein.