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Duration of Lien of Mortgage

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The Montana Court has not considered these objections to its standard as laid down by the *Peel, Keerl, and Narich* cases. If the conclusions of this comment are accepted it would seem that the law governing the proper instructions on insanity in Montana might well be clarified by a fuller examination of the question with a more precise statement from the Court as to how it intends that these essentially inconsistent doctrines be reconciled in the law, on the one hand, or with the explicit selection of the one or the other as controlling all such instructions, on the other.

Walter P. Coombs.

DURATION OF LIEN OF MORTGAGE

The problem of the duration of the lien of a mortgage under M. R. C., 1921, Sec. 8267, and under that section as amended in 1933, has long been a perplexing one to lawyers practicing in Montana. Cases decided prior to 1939 applied and construed the statute as it existed before the 1933 amendment. The pertinent portion of the statute read:

> "Every mortgage of real property, made, acknowledged and recorded as provided by the laws of this State, is thereupon good and valid as against the creditors of the mortgagor or owner of the land mortgaged, or subsequent purchasers or encumbrancers, from the time it is so recorded until eight years after the maturity of the entire debt or obligation secured thereby and no longer unless the mortgagee . . . within sixty days after the expiration of said eight years, . . . file an affidavit setting forth [stated facts]."[1]

The first case construing Sec. 8267 was *Morrison v. Farmers' & Traders State Bank, et al.*[2] In it the Court reached the conclusion that M. R. C., 1921, Sec. 8243, which provided in effect that the lien of a mortgage was good as long as the debt was enforceable, had been amended by Sec. 1, Ch. 27, L. 1913,

is to determine whether the defendant knew the difference between right and wrong? Is the conflict as to whether "irresistible impulse" is a defense, a further example of difference of opinion among the Courts as to the meaning of "criminal intent"? See *supra*, note 12.

[1] A mortgage may be extended under the provisions of R.C.M., 1935, Sec. 8264, which reads, "A mortgage of real property can be created, renewed, or extended, only by writing, with the formalities required in the case of a grant of real property". This section deals with an agreement by the mortgagor and mortgagee, while under Sec. 8267 the affidavit of renewal is filed by the mortgagee alone.

[2] 70 Mont. 146, 225 Pac. 123 (1924). Berkin v. Healy, 52 Mont. 398, 158 Pac. 1020 (1916), held that the statute could not apply to the facts in that case.

which appeared unchanged in M. R. C., 1921, as Sec. 8267, and that, although the debt remained alive, the lien of the mortgage, as against a subsequent purchaser who took with knowledge, ceased to exist at the expiration of the period provided for in the statute, when an affidavit of renewal had not been filed in accordance therewith. The Court treated the statute as in effect a statute of limitations and used broad language indicating that the same result would have been reached even if the original mortgagor had been still the owner.

The Montana Court in subsequent decisions first limited the broad statements in the *Morrison case,*[3] then ruled contrary to it without mentioning the *Morrison* case,[4] and finally awoke to the fact that the *Morrison* case had been in effect overruled by the earlier case.[5]

The weight of authority in this country now seems to be that provisions for renewal of the mortgage by filing affidavit or other specified methods do not apply to the original parties to the mortgage, but relate to the effect of the record as giving notice to third persons and to the enforcement of the mortgage lien as against such third persons.[6]

Sec. 8267 was amended by Sec. 1, Ch. 104, L. 1933, and in place of the words, "is thereupon good and valid as against *the creditors of the mortgagor or owner of the land mortgaged, or subsequent purchasers or encumbrancers,*" there was substituted, "is thereupon good and valid as against *all.*"

The effect of the 1933 amendment has not yet been directly determined by the Montana Supreme Court. The Court has, though, suggested that the amendment has resulted in making Sec. 8267 an absolute statute of limitations. In *Reed v. Richardson,*[7] the Court, following *Skillen v. Harris* and *Turner v. Powell,*[8] held that one who took by virtue of the foreclosure of a second mortgage and a quit-claim deed and who failed to set up the general statute of limitations could derive no advantage from the first mortgagee's failure to file an affidavit of renewal. But, at the same time, the court indicated that a different result

[3] The Court held that as to the mortgagor the lien of the mortgage existed as long as the debt was enforceable even though the period specified in Sec. 8267 expired without filing an affidavit of renewal. Skillen v. Harris, *et. al.*, 85 Mont. 73, 277 Pac. 803 (1929).

[4] As to a purchaser of the mortgaged property who assumed the mortgage, filing of the affidavit of renewal was unnecessary if the debt was still alive. Turner v. Powell, 85 Mont. 241, 278 Pac. 512 (1929).

[5] Reed v. Richardson, 94 Mont. 34, 20 P. (2d) 1054 (1933).

[6] Wasson v. Beekman, 188 Ark. 895, 68 S.W. (2d) 93 (1934), T. A. Hill State Bank v. Schindler, 33 S.W. (2d) 833 (Tex. Civ. App. 1930), Head v. Oldham Bank & Trust Co., 249 Ky. 292, 60 S. W. (2d) 624 (1933). *In re* Glen, 2 F. Supp. 579 (W. D., S. Car. 1932), Cullen v. Reed, 220 Fed. 356 (1915), the holding of which, with respect to Sec. 8267, the Morrison case refused to follow. See also, 17 NEB. L. B. 139 (1938).

[7] 94 Mont. 34, 20 P. (2d) 1054 (1933).

[8] See footnotes 3 and 4, *supra.*

might have been reached if Sec. 8267, as amended, had governed, when it noted:

> "It is pertinent to observe that at the recent session of the legislative assembly the section (8267) was amended. Many of the points involved in this case and in other cases mentioned will not be troublesome in the future."

The amendment has not, however, put an end to litigation over Sec. 8267. The statute as amended was discussed in the recent case of *Siuru v. Sell.*[9] In this case plaintiff had mortgaged land to defendant and, while the mortgage debt had never been paid, defendant mortgagee had failed to file an affidavit of renewal within the statutory period. In a foreclosure suit the District Court found that the debt was still alive, gave the mortgagee a judgment for the amount of the debt, but determined that under Sec. 8267, as amended, the lien of the mortgage was gone by reason of the mortgagee's failure to file the renewal affidavit. Shortly before judgment was entered the mortgagor filed a declaration of homestead on the property. The mortgagee did not appeal from the determination that the mortgage was barred, but instead proceeded under the judgment and sought to levy execution on the same property. The mortgagor then brought suit to enjoin the sale of this property on the ground that it was his homestead. From a judgment granting the injunction, the mortgagee appealed to the Supreme Court. The existence or non-existence of the mortgage lien was not in issue in this proceeding since it had already been conclusively determined. The Court, proceeding on the basis that the lien of the mortgage was gone, held that the mortgagor's declaration of homestead was effective against levy of execution under the judgment obtained on the mortgage debt.

Because of the language in *Reed v. Richardson,* previously quoted, and the breadth of the phrase "as against all" in the amended section, it seems fairly safe to predict that if a case comes before the Supreme Court requiring a decision, the Court will hold that the lien of a recorded mortgage expires at the end of the statutory period, even as against the mortgagor, unless an affidavit of renewal is filed.

Such a result would be in conformity to that reached under recent statutes in other States on the subject. These statutes provide that the mortgage lien is to be absolutely barred after a specified period of years from the maturity of the principal obligation, unless within a stated time an extension agreement is placed on record.[10]

[9] 108 Mont. 438, 91 P. (2d) 411 (1939).

[10] IDAHO CODE ANN. (1932), 44-1102, 1103; ILL. REV. STAT. (Cahill & Moore) 1935, C. 83, Sec. 11a; MASON'S MINN. STATS. (1927), Sec. 9188. See also, 49 HARV. L. REV. 643 (1936).

Such legislation has been given new impetus by the proposed Uniform Real Estate Mortgage Act. Section 12(1) of that act is modeled after Sec. 9188, MASON'S MINN. STATS., 1927, and reads as follows:

> "At the expiration of a period of (fifteen) years from the last definite date of maturity of the debt or other obligation secured by a mortgage as stated therein, or in an extension thereof duly executed and recorded as herein provided, and if no definite date for any maturity be stated therein, then at the expiration of a like period from the date of the mortgage or of the extension, the lien of the mortgage shall cease and no suit or proceedings shall be begun thereafter to foreclose the mortgage."[11]

It is however, to be noted that even though the effect of the 1933 amendment be taken as a legislative attempt to conform to these recent statutes, Sec. 8267 is not a satisfactory substitute for Sec. 12 of the proposed Uniform Real Estate Mortgage Act. It leaves many problems in its wake.

Sec. 8267, even in its present form, applies only to recorded mortgages.[12] The question of the duration of the lien of an unrecorded mortgage under the present statutes will undoubtedly be troublesome in the future. Sec. 8243 is still on the statute books and provides in effect that the lien of a mortgage is good as long as the debt is enforceable. Sec. 8243 was amended by Sec. 8267 only in so far as recorded mortgages are concerned.[13] Sec. 8243 would then seem to be controlling in the case of an unrecorded mortgage and the lien of the mortgage would appear to continue as long as the debt is enforceable. Under the present statutes, then, and in the absence of judicial legislation, the lien of an unrecorded mortgage would under some circumstances exist much longer than that of a recorded mortgage. A recorded mortgage secured by a note which matures in two years will, unless an affidavit of renewal is filed, no longer be a lien after ten years and, even if the affidavit is filed, the mortgage lien will not continue for more than a total of eighteen years.[14] On the other hand, the lien of an unrecorded mortgage presumably

[11] HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS (1927), p. 680, Sec. 12 (104). See also 38 HARV. L. REV. 651, 653 (1925).

[12] Sec. 8267 by its terms applies to mortgages "made, acknowledged, and *recorded*" and specifies that any such mortgage "shall be good as against all from the time it is so *recorded*". Sec. 12 (1) of the proposed Uniform Real Estate Mortgage Act applies to all mortgages whether recorded or not.

[13] Morrison v. Farmers' & Traders State Bank, *et al*, 70 Mont. 146, 225 Pac. 123 (1924); Vitt v. Rogers, 81 Mont. 120, 262 Pac. 164 (1927); Reed v. Richardson, 94 Mont. 34, 20 P. (2d) 1054 (1933).

[14] Unless the mortgage is extended under the provisions of R.C.M., 1935, Sec. 8264.

will continue for an indefinite period. Payments upon or proper acknowledgement of the debt will prevent the statute of limitations running; the debt may remain enforceable for an indefinite period of time and the mortgage lien apparently will be extended accordingly as against all who are not purchasers for value and in good faith. The longer a mortgage is kept off the record, then, the more advantageous the position of the mortgagee, insofar as concerns duration of his lien.

In order to prevent this anomalous situation, the Montana Court, in the absence of legislative action, would be compelled to overlook the wording of Sec. 8267, which by its terms applies only to a recorded mortgage. A proper solution of the problem is action on the part of the Montana legislature.

William F. Browning.

CONSTRUCTIVE DELIVERY OF DEEDS DEPENDENT UPON DEATH OF GRANTOR

In *Carnahan v. Gupton*,[1] recently decided by the Montana Supreme Court, an owner of an undivided one-half interest in certain land, after executing deeds to his nephew and the latter's wife, placed the deeds in his safety deposit box, to which he alone had access, in an envelope addressed to the grantees, and wrote his nephew informing him of these acts and instructing him that the deeds would be delivered to him upon presentation of the letter to the depositary bank after the grantor's death. The bank had notice of this arrangement. The grantor continued until his death to farm the land and to render annual accounts to his co-owner. After the death of the grantor, his administrator delivered the deeds to the grantees, who recorded them, but the other heirs brought suit to have them declared invalid. *Held,* the deeds had not been delivered, were formally insufficient as a will, and so were without legal effect.

Authorities are agreed that "a grant takes effect, so as to vest the interest intended to be transferred, only upon its delivery by the grantor."[2] The concept of delivery, however, is one of uncertain and varying content. This, of course, is due to the fact that the term is used, not to indicate a physical act, but to describe a legal result. While all Courts, including the Montana court in the principal case, doubtless recognize that fact, nevertheless much of the confusion in the application of the concept may be charged to failure of the Courts to make clear whether it is relinquishment of control over the instrument or over its legal effect, or both, which they consider essential to delivery. The usual statement is simply that the grantor must

[1] 96 P. (2d) 513 (Mont. 1939).
[2] Sec. 6843, R. C. M., 1935; 4 TIFFANY, REAL PROP. (3d Ed.), Sec. 1033.