

Chapter 86

Mortgages, Real and Chattel

86.010

NOTES OF DECISIONS

1. In general
2. Mortgagee in possession
3. Effect of 1927 amendment

1. In general

A mortgage of real property creates only a lien or incumbrance. *Anderson v. Baxter*, (1871) 4 Or 105; *Renshaw v. Taylor*, (1879) 7 Or 315; *Sellwood v. Gray & DeLashmutt*, (1884) 11 Or 534, 5 P 196; *Marx v. La Rocque*, (1895) 27 Or 45, 47, 39 P 401; *Dekum v. Multnomah County*, (1900) 38 Or 253, 256, 63 P 496; *Caston v. Story*, (1905) 47 Or 150, 152, 80 P 217, 114 Am St Rep 912; *Higgs v. McDuffie*, (1916) 81 Or 256, 265, 157 P 794, 158 P 953; *Savings & Loan Socy. v. Multnomah County*, (1895) 169 US 421, 426, 18 S Ct 392, 42 L Ed 803; *Semple v. Bank of British Columbia*, (1878) 5 Sawy 88, Fed Cas No. 12,659; *Guest v. Packwood*, (1888) 34 Fed 368, 375, 13 Sawy 202; *Investors Syndicate v. Smith*, (1939) 105 F2d 611; *Smith v. Portland Sav. & Loan*, (1956) 207 Or 546, 296 P2d 481, 298 P2d 185.

A conveyance absolute on its face, intended as a mortgage or security, must be foreclosed before the grantor can be divested of his estate. *Vincent v. First Nat. Bank*, (1915) 76 Or 579, 143 P 1100, 149 P 938; *Caro v. Wollenberg*, (1914) 68 Or 420, 430, 136 P 866; *Angus v. Holbrooke*, (1918) 87 Or 543, 545, 170 P 1179; *State v. McDonald*, (1929) 128 Or 684, 274 P 1104.

The right to redeem is favored by a court of equity, and will not be taken away except on strict compliance with the necessary steps. *Caro v. Wollenberg*, (1914) 68 Or 420, 430, 136 P 866.

Foreclosure can be avoided if the mortgagor unconditionally conveys his interest in the realty to the mortgagee by properly executed deed. *Id.*

2. Mortgagee in possession

A mortgagee who obtains possession after condition broken with the assent of the mortgagor, may retain possession as against the mortgagor until the amount due is realized out of rents and profits or by direct payment. *Roberts v. Sutherlin*, (1872) 4 Or 219; *Cooke v. Cooper*, (1889) 18 Or 142, 22 P 945, 17 Am St Rep 709, 7 LRA 273; *Lambert v. Howard*, (1907) 49 Or 342, 345, 90 P 150; *Witherell v. Wiberg*, (1877) 4 Sawy 232, Fed Cas No. 17,917; *Bilger v. Numan*, (1912) 118 CCA 23, 199 Fed 549; *Investor's Syndicate v. Smith*, (1939) 105 F2d 611.

In an action of ejectment initiated by a mortgagor against a mortgagee in possession, the mortgagee must allege in his answer that he took possession with the assent of the mortgagor or his answer is insufficient. *Witherell v. Wiberg*, (1877) 4 Sawy 232, Fed Cas No. 17,917.

Although title to permanent improvements made by the mortgagee in possession passes to the mortgagor upon redemption, the mortgagee will not be reimbursed for the improvements unless at the time the work was done he had the mortgagor's consent to improve the land or a belief

in good faith that he owned the premises. *Caro v. Wollenberg*, (1917) 83 Or 311, 163 P 94.

Interest on interest due when he took possession cannot be recovered by a mortgagee in possession. *Id.*

At the instance of the creditors of an insolvent mortgagor a receiver can be appointed to take possession from a mortgagee in possession if the latter is committing waste and is insolvent. *Brayton & Lawbaugh v. Monarch Lbr. Co.*, (1918) 87 Or 365, 387, 169 P 528, 170 P 717.

3. Effect of 1927 amendment

Prior to the 1927 amendment, stipulations providing for the appointment of a receiver, or for the receipt of rents and profits or possession of the premises by the mortgagee upon conditions broken, were unenforceable. *Teal v. Walker*, (1884) 111 US 242, 4 S Ct 420, 28 L Ed 415; *Thomsen v. Shirley*, (1895) 69 Fed 484; *Couper v. Shirley*, (1896) 21 CCA 288, 75 Fed 168; *Investor's Syndicate v. Smith*, (1939) 105 F2d 611. *Couper v. Shirley*, supra, distinguished in *Elk Fork Oil & Gas Co. v. Foster*, (1900) 39 CCA 615, 99 Fed 495 and *First Nat. Bank v. Detroit Trust Co.*, (1918) 160 CCA 156, 248 Fed 16.

By virtue of the 1927 amendment this section permits an owner of real property, other than farm land and homestead, to mortgage or pledge the rents and profits from the land and to lawfully stipulate in a mortgage that the mortgagee is entitled to possession upon default. *Investor's Syndicate v. Smith*, (1939) 105 F2d 611.

Prior to the 1927 amendment a receiver could not lawfully be appointed in a mortgage foreclosure suit, unless the security was inadequate, the mortgagor insolvent and there was waste or danger of loss or destruction of the property. *Id.*

Under the 1927 amendment, the court may appoint a receiver to collect rents and profits in a mortgage foreclosure suit by virtue of the fact that they have been mortgaged or pledged. *Id.*

FURTHER CITATIONS: *Mathews v. Eddy*, (1812) 4 Or 225; *Hermann v. Churchill*, (1963) 235 Or 327, 385 P2d 190.

LAW REVIEW CITATIONS: 17 OLR 83; 43 OLR 350.

86.020

NOTES OF DECISIONS

1. In general

A mortgagee may not compel a creditor having a prior judgment lien to satisfy his lien out of other property of the debtor since a mortgage being nothing but a lien dischargeable by payment subsists in equity and may attach to other real property of the common debtor by marshaling of securities or by subrogation. *Dickson v. Back*, (1897) 32 Or 217, 51 P 727.

2. Deficiency decrees

A deficiency judgment may be rendered against the mortgagor upon foreclosure of a realty mortgage securing a promissory note. *Myer v. Beal*, (1873) 5 Or 130; *Stewart*

v. Templeton, (1910) 55 Or 364, 104 P 978, 106 P 640; Wright v. Wimberly, (1916) 79 Or 626, 156 P 257.

Where the statute of limitations has barred the note, the mortgagee's relief is limited to foreclosure and sale of the lands described in the mortgage, without a deficiency decree. Myer v. Beal, (1873) 5 Or 130.

If the promise to pay is limited to such funds as may result from a sale of the mortgaged property, there can be no personal judgment against the mortgagor. Kramer v. Wilson, (1907) 49 Or 333, 90 P 183.

LOL 426 [ORS 88.070] impliedly amended this section's authorization of deficiency judgments, as to purchase money mortgages. Wright v. Wimberly, (1916) 79 Or 626, 156 P 257.

The statement "The mortgagors consent to a personal judgment for the payment of the debt hereby secured, irrespective of this security," contained in a mortgage, was not an express covenant for payment of the debt, but was an agreement that a deficiency judgment might be rendered on the accompanying note. Omicron Co. v. Williams, (1943) 172 Or 9, 139 P2d 547.

86.030

NOTES OF DECISIONS

1. Mortgage or absolute deed

Party seeking to have deed adjudged a mortgage must show willingness to do equity by paying the debt. Colahan v. Smyth, (1938) 159 Or 569, 81 P2d 112; Hermann v. Churchill, (1963) 235 Or 327, 385 P2d 190.

Where the relation of debtor and creditor remains and the debt still subsists, an absolute deed is in reality a mortgage. Kramer v. Wilson, (1907) 49 Or 333, 90 P 183.

To overcome the presumption that a deed absolute is what the parties intended, parol evidence may be sufficient, but it should clearly preponderate. Colahan v. Smyth, (1938) 159 Or 569, 81 P2d 112.

To have an absolute deed declared a mortgage, the party must prove the fact by clear and convincing evidence. *Id.*

A disputable presumption arises from an absolute deed that it evidences the intention of the parties, except in cases of fraud, and to construe such a deed to the contrary requires proof that is clear, convincing and consistent. Blue River Sawmills v. Gates, (1960) 225 Or 439, 358 P2d 239.

Statutes as to foreclosure of mortgages are inapplicable in a suit to have a deed absolute declared a mortgage. Hermann v. Churchill, (1963) 235 Or 327, 385 P2d 190.

The surrender of the mortgage note and cancellation of the lien in return for a deed absolute in form showed that the conveyance was not intended as a mortgage. Harmon v. Grants Pass Banking & Trust Co., (1911) 60 Or 69, 118 P 188.

2. Notice

Recordation in the deed records of a mortgage drawn in the form of a deed is sufficient. Haseltine v. Espey, (1886) 13 Or 301, 10 P 423; Security Sav. & Trust Co. v. Loewenberg, (1900) 38 Or 159, 62 P 647.

There is "actual notice" when the subsequent purchaser has knowledge of such facts as would put a prudent man upon inquiry, which, if prosecuted with ordinary diligence, would lead to actual notice. Exon v. Dancke, (1893) 24 Or 110, 32 P 1045.

A purchaser from the grantee of a recorded deed was, not put on notice of the grantor's equity under an unrecorded defeasance by the grantor's continued possession. *Id.*

A creditor who attached property previously mortgaged by a deed absolute in form, recorded as a deed, was char-

geable with notice of the debt secured by the original transfer and any subsequent pledges of the same property to the transferee. Security Sav. & Trust Co. v. Loewenberg, (1900) 38 Or 159, 62 P 647.

LAW REVIEW CITATIONS: 17 OLR 83.

86.050

ATTY. GEN. OPINIONS: Rate of interest State Land Board may charge on sums paid for taxes, 1936-38, p 11.

86.060

NOTES OF DECISIONS

The word "may," as used herein, does not mean "must." Barringer v. Loder, (1905) 47 Or 223, 81 P 778; United States Nat. Bank v. Holton, (1921) 99 Or 419, 195 P 823.

An assignment without delivery of the note and the mortgage cannot ordinarily be regarded as having been made in good faith. United States Nat. Bank v. Holton, (1921) 99 Or 419, 195 P 823; Oregon & Wash. Trust Inv. Co. v. Shaw, 5 Sawy 336, Fed Cas No. 10,556, rehearing granted, Fed Cas No. 10,557.

This section does not repeal ORS 86.110. Barrington v. Loder, (1905) 47 Or 223, 81 P 778.

A recorded assignment is good between the parties although the note and mortgage are not delivered to the assignee. United States Nat. Bank v. Holton, (1921) 99 Or 419, 195 P 823.

The lawful assignment of a note carries with it the mortgage securing it. *Id.*

A clerical defect in an assignment does not affect its validity as between the parties. *Id.*

A mortgagor was not justified in paying the assignee under a recorded assignment where he knew another person had claimed ownership through a previous unrecorded assignment. Barrington v. Loder, (1905) 47 Or 223, 81 P 778.

A defense to a foreclosure suit that the mortgage was not assigned with statutory formalities was not available where not properly pleaded. Lassas v. McCarty, (1906) 47 Or 474, 84 P 76.

An assignee under a recorded assignment who failed to demand the note and mortgage from the assignor took subject to the rights of an innocent subsequent assignee. United States Nat. Bank v. Holton, (1921) 99 Or 419, 195 P 823.

ATTY. GEN. OPINIONS: Fee for recording and indexing assignment covering 30 real property mortgages, 1964-66, p 145.

LAW REVIEW CITATIONS: 17 OLR 83.

86.080

NOTES OF DECISIONS

If the note secured by the mortgage is negotiable, the mortgagor may pay the holder without resorting to the record. Henningsen v. Title & Trust Co., (1935) 151 Or 318, 49 P2d 458.

The mortgagor is not justified in paying the mortgagee, where an assignment was recorded, unless the latter produces the note or shows that the assignee authorized him to collect. *Id.*

Agent's possession of interest notes and authority to collect interest, where agent was named payee in interest and principal notes and assignment from agent to plaintiff was recorded, did not constitute authority for mortgagor to pay principal to agent. Tilton v. Boland, (1934) 147 Or 28, 31 P2d 657.

FURTHER CITATIONS: *Bamberger v. Geiser*, (1893) 24 Or 203, 33 P 609.

LAW REVIEW CITATIONS: 17 OLR 83.

86.100

NOTES OF DECISIONS

A certificate of release under seal does not fail for lack of consideration. *Barnum v. Lockhart*, (1915) 75 Or 528, 146 P 975.

FURTHER CITATIONS: *Oregon & Wash. Trust Inv. Co. v. Shaw*, 5 Sawy 336, Fed Cas No. 10,556, rehearing granted, Fed Cas No. 10,557.

ATTY. GEN. OPINIONS: Merger of lien of second mortgage where legal title is acquired by mortgagee, 1940-42, p 350.

LAW REVIEW CITATIONS: 17 OLR 83.

86.110

NOTES OF DECISIONS

This section was not repealed by enactment in 1895 of BC 5362 [ORS 86.060]. *Barringer v. Loder*, (1905) 47 Or 223, 81 P 778; *United States Nat. Bank v. Holton*, (1921) 99 Or 419, 195 P 823.

LAW REVIEW CITATIONS: 17 OLR 83.

86.120

NOTES OF DECISIONS

A certificate of release under seal by the record owner does not fail for lack of consideration. *Barnum v. Lockhart*, (1915) 75 Or 528, 146 P 975.

An assignee who failed to record his assignment lost his rights where a subsequent innocent purchaser procured a recordation of satisfaction from the record owner. *Willamette Coll. & Cred. Serv. v. Gray*, (1937) 157 Or 77, 70 P2d 39.

FURTHER CITATIONS: *Barrington v. Loder*, (1905) 47 Or 223, 81 P 778; *United States Nat. Bank v. Holton*, (1921) 99 Or 419, 195 P 823; *Union Cent. Life Ins. Co. v. Toliver*, (1936) 152 Or 185, 52 P2d 1129.

ATTY. GEN. OPINIONS: Validity of satisfaction or release of several mortgages included and recorded in one instrument, 1934-36, p 219; propriety of refusal by county clerk to subscribe a marginal entry denoting discharge of a mortgage until its authenticity is proven, 1950-52, p 202.

LAW REVIEW CITATIONS: 11 OLR 293; 17 OLR 83; 23 OLR 206.

86.140

NOTES OF DECISIONS

1. In general
2. Accrual of cause of action
3. Limitation periods
4. Defenses
5. Damages

1. In general

This enactment is penal in character. *Malarkey v. O'Leary*, (1899) 34 Or 493, 56 P 521. *Nordling v. Johnson*, (1955) 205 Or 315, 283 P2d 994, 287 P2d 420.

"Reasonable charges" covers charges reasonably incurred in the discharge of the mortgage and not attorneys fees

incurred in the preparation of foreclosure proceedings. *Malarkey v. O'Leary*, (1899) 34 Or 493, 56 P 521.

The rule of strict construction will be applied to this provision, since it is a penal one. *Knudson v. Knudson*, (1929) 128 Or 635, 275 P 663.

2. Accrual of cause of action

The cause of action accrues at the close of the 10th day following the performance of the mortgage condition, tender of charges and request for discharge, and the limitation period begins to run from such date. *Ebbert v. First Nat. Bank*, (1929) 131 Or 57, 279 P 534.

3. Limitation periods

The three-year limitation period applies to the provision authorizing recovery of the sum of \$100. *Ebbert v. First Nat. Bank*, (1929) 131 Or 57, 279 P 534.

The six-year statute of limitations applies to the provision for recovery of actual damages. *Id.*

4. Defenses

The fact that the mortgagee acted in good faith does not necessarily constitute a defense. *Malarkey v. O'Leary*, (1899) 34 Or 493, 56 P 521.

That the mortgagor may be otherwise indebted to the mortgagee constitutes no defense. *Id.*

5. Damages

A mortgagor cannot recover exemplary damages unless he tenders an instrument of satisfaction for the mortgagee's signature or offers to pay the expenses of a marginal release. *Knudson v. Knudson*, (1929) 128 Or 635, 275 P 663.

Where the right to recover penal damages is barred by the statute of limitations and no proof of actual damages is made, nominal damages alone can be awarded. *Ebbert v. First Nat. Bank*, (1929) 131 Or 57, 279 P 534.

FURTHER CITATIONS: *Dixon v. Simpson*, (1929) 130 Or 211, 279 P 939.

ATTY. GEN. OPINIONS: Fees for recording a satisfaction of a mortgage on property belonging to the state, 1936-38, p 660.

86.610

ATTY. GEN. OPINIONS: Authority of a state agency to invest in a mortgage insured by the federal housing administration, 1936-38, p 150; application to mutual savings banks, 1938-40, p 713.

86.620

ATTY. GEN. OPINIONS: Authority of a state agency to invest in a mortgage insured by the federal housing administration, 1936-38, p 150; application to mutual savings banks, 1938-40, p 713.

86.640

ATTY. GEN. OPINIONS: Authority of a state agency to invest in a mortgage insured by the federal housing administration, 1936-38, p 150; application to mutual savings banks, 1938-40, p 713.

86.705 to 86.795

LAW REVIEW CITATIONS: 44 OLR 149-157.

86.715

ATTY. GEN. OPINIONS: Indexing trust deeds, 1960-62, p 288.

86.735

LAW REVIEW CITATIONS: 39 OLR 126.

86.745

ATTY. GEN. OPINIONS: Indexing trust deeds, 1960-62, p 288.

86.760

NOTES OF DECISIONS

This section does not limit the amount of attorney fees in a negotiated settlement. West Portland Dev. Co. v. Ward Cook, Inc., (1967) 246 Or 67, 424 P2d 212.

86.770

LAW REVIEW CITATIONS: 39 OLR 126.