

## Chapter 88

### Foreclosure of Liens Generally

88.010

#### NOTES OF DECISIONS

1. In general
2. Application to specific liens
3. Exclusiveness of remedy
4. Personal decree
5. Election between action on debt and foreclosure

#### 1. In general

A suit to foreclose a mortgage is not for the determination of any right to, or interest in realty but to have the property adjudged to be sold to satisfy the debt. *Anderson v. Baxter*, (1871) 4 Or 105; *Schleef v. Purdy*, (1923) 107 Or 71, 214 P 137.

The death of the mortgagor and the proceedings to administer his estate in the probate court do not affect the right to foreclose the mortgage in the circuit court. *Verdier v. Bigne*, (1888) 16 Or 208, 19 P 64; *Teel v. Winston*, (1892) 22 Or 489, 29 P 142.

A suit to foreclose a mortgage is a proceeding in rem and service of summons may be made by publication. *Swift v. Meyers*, (1888) 37 Fed 37, 13 Sawy 583.

A suit to foreclose a chattel mortgage is a transitory suit and can be instituted in any county in the state in which defendants reside or are found. *Commercial Nat. Bank v. Davidson*, (1889) 18 Or 57, 22 P 517.

The sale under a decree of foreclosure extinguishes the lien of the mortgage. *Willis v. Miller*, (1893) 23 Or 352, 31 P 827.

A suit to foreclose a mortgage on an undivided interest in fee is not abated by mortgagor's suit to partition the property wherein mortgagee is made a party. *Ukase Inv. Co. v. Smith*, (1919) 92 Or 337, 181 P 7.

#### 2. Application to specific liens

This section does not apply to the foreclosure of the rights of a vendee in a contract to convey land. *Security Sav. & Trust Co. v. Mackenzie*, (1898) 33 Or 209, 52 P 1046; *Flanagan Estate v. Great Cent. Land Co.*, (1904) 45 Or 335, 77 P 485; *Miles v. Hemenway*, (1911) 59 Or 318, 111 P 696, 117 P 273; *Sheehan v. McKinstry*, (1922) 105 Or 473, 210 P 167, 34 ALR 1315; *Renard v. Allen*, (1964) 237 Or 406, 391 P2d 777.

Foreclosure of liens under this section: **Chattel mortgage**, *Commercial Nat. Bank v. Davidson*, (1889) 18 Or 57, 22 P 517; *McNeff v. So. Pac. Co.*, (1912) 61 Or 22, 120 P 6; *Williamson v. Hurlburt*, (1921) 99 Or 336, 195 P 562; *Kummer v. Lauman*, (1932) 138 Or 514, 7 P2d 556; **deed of trust for security**, *Marquam v. Ross*, (1905) 47 Or 374, 423, 78 P 698, 83 P 852, 86 P 1; **landlord's lien, reserved in lease, on tenant's furniture**, *Swank v. Elwert*, (1910) 55 Or 487, 105 P 901, 904; **contract lien on personalty**, *Brown v. Truax*, (1911) 58 Or 572, 115 P 597; **proceeding to recover damages for fault of vessel**, *Cordrey v. The Bee*, (1922) 102 Or 636, 201 P 202, 20 ALR 1079; **lien of pledge**, *Holt v. Guar. & Loan Co.*, (1931)

136 Or 272, 296 P 852; **mortgage by a deed absolute on its face**, *Libel v. Pierce*, (1934) 147 Or 132, 31 P2d 1106; *Murray v. Wiley*, (1942) 169 Or 381, 127 P2d 112, 129 P2d 66; **water improvement bonds of improvement company**, *Nelson v. McAllister Dist. Imp. Co.*, (1936) 155 Or 95, 62 P2d 950; **lien of state for poundage fees due from fish cannery**, *State v. Swensk*, (1939) 161 Or 281, 89 P2d 587.

#### 3. Exclusiveness of remedy

Foreclosure by suit is the exclusive method of enforcing a lien upon realty. *Thompson v. Marshall*, (1891) 21 Or 171, 27 P 957; *Caro v. Wollenberg*, (1914) 68 Or 420, 136 P 866; *Harper v. Interstate Brewery Co.*, (1942) 168 Or 26, 120 P2d 757.

A stipulation in a chattel mortgage prescribing a different method of foreclosure is valid. *Jacobs v. McCalley*, (1879) 8 Or 124.

By filing a suit for strict foreclosure plaintiff waives his right to declare a forfeiture in accordance with the contract. *Nygard v. Anderson*, (1961) 229 Or 323, 366 P2d 899.

#### 4. Personal decree

Personal judgment may not be rendered in the foreclosure of a lien where a personal obligation was not given. *Myer v. Beal*, (1873) 5 Or 130; *McCann v. Ore. Scenic Trips Co.*, (1922) 105 Or 213, 209 P 483; *McCormack v. Bertschinger*, (1925) 115 Or 250, 237 P 363.

Where defendant being indebted to plaintiff on a note, sells land and assigns the mortgage, executed by the purchaser, to the plaintiff as collateral, the foreclosure of such mortgage does not entitle plaintiff to a personal decree against defendant. *First Nat. Bank v. Seaward*, (1916) 78 Or 567, 152 P 883.

In an action to foreclose a timber lien, judgment for money may properly be rendered against the defendant in addition to foreclosure. *Johnson v. Shasta View Lbr. & Box Co.*, (1929) 129 Or 469, 278 P 588.

In an action to foreclose a chattel mortgage securing a note given for a purchase price, the court should enter judgment against the defendant for the full amount due on the note. *Hubbs v. Whse. Serv. Corp.*, (1935) 149 Or 559, 42 P2d 180.

Personal judgment was entered against the mortgagor who had sold the land to a grantee who assumed payment of the mortgage. *Higgs v. McDuffie*, (1916) 81 Or 256, 157 P 794, 158 P 953.

Complaint was sufficient, in action to foreclose lien on an automobile, to show a personal obligation to pay and a right to recover on the personal obligation. *Covey Motor Car Co. v. Kliks*, (1924) 111 Or 394, 225 P 1097.

#### 5. Election between action on debt and foreclosure

Though the statute of limitations has run against the note and there cannot be a personal decree, the mortgage securing the same may be foreclosed. *Myer v. Beal*, (1873) 5 Or 130; *Overholt v. Dietz*, (1903) 43 Or 194, 72 P 695; *Schwary v. Schwary*, (1932) 138 Or 690, 7 P2d 986.

The mortgagee may elect whether to foreclose the mort-

gage or bring an action at law against the parties personally liable for the debt, but if the mortgage is a purchase money mortgage the foreclosure decree bars the separate action on the debt. *Wright v. Wimberly*, (1919) 94 Or 1, 184 P 740; *Lutz v. Blackwell*, (1929) 128 Or 39, 273 P 705; *Wright v. Nothnagel*, (1939) 163 Or 156, 96 P2d 228; *Eubanks v. Leveridge*, (1877) 4 Sawy 274, Fed Cas No. 4544.

Where the mortgagee instituted a foreclosure suit which on his own motion was dismissed, he could then bring an action at law on the note which the mortgage was given to secure. *Union Trust Co. v. Wiseman*, (1926) 10 F2d 558.

FURTHER CITATIONS: *Matthews v. Eddy*, (1872) 4 Or 225; *Sears v. Abrams*, (1883) 10 Or 499; *Thompson v. Holladay*, (1887) 15 Or 34, 14 P 725; *Keller v. Lonsdale*, (1959) 217 Or 339, 339 P2d 112; *Kam v. Pidcock*, (1960) 225 Or 406, 357 P2d 509; *Metropolitan Life Ins. Co. v. Barker*, (1962) 233 Or 111, 377 P2d 162; *Hermann v. Churchill*, (1963) 235 Or 327, 385 P2d 190; *Henderson v. Morey*, (1965) 241 Or 164, 405 P2d 359; *Wakehouse v. Wetzel*, (1968) 250 Or 391, 443 P2d 227.

ATTY. GEN. OPINIONS: Taxation of property acquired by city through foreclosure of lien, 1924-26, p 234; constitutionality of bill to authorize court to fix valuation of mortgaged property in foreclosure proceedings, 1934-36, p 264.

LAW REVIEW CITATIONS: 14 OLR 536; 17 OLR 333; 43 OLR 350; 47 OLR 146.

## 88.030

## NOTES OF DECISIONS

## 1. In general

The owner of the equity of redemption is an indispensable party and without him the suit cannot proceed. *Osborn v. Logus*, (1895) 28 Or 302, 37 P 456, 38 P 190, 42 P 997; *Hawkinson v. Rostad*, (1917) 86 Or 704, 169 P 350.

After the mortgagor's death his heirs are necessary parties in a foreclosure suit. *Renshaw v. Taylor*, (1879) 7 Or 315.

The proper procedure to bar the rights of a junior lienor who was not made a party to the foreclosure suit is a suit for strict foreclosure requiring him to redeem within a reasonable time or be barred. *Koerner v. Willamette Iron Works*, (1899) 36 Or 90, 58 P 863, 78 Am St Rep 759.

A second mortgagee who is made a defendant in the foreclosure of the first mortgage but does not answer may subsequently bring an action at law on the note which his mortgage secures. *Lutz v. Blackwell*, (1929) 128 Or 39, 273 P 705.

## 2. Subsequent lienors

Subsequent lienors are considered necessary parties but the decree is valid notwithstanding their omission except that the omitted lienors are not bound or affected by the decree. *DeLashmutt v. Sellwood*, (1882) 10 Or 319; *Sellwood v. Gray*, (1884) 11 Or 534, 5 P 196; *Wilson v. Tarter*, (1892) 22 Or 504, 30 P 499; *Osborn v. Logus*, (1895) 28 Or 302, 37 P 456, 38 P 190, 42 P 997; *Games v. Childers*, (1900) 38 Or 200, 63 P 487; *Williams v. Wilson*, (1902) 42 Or 299, 70 P 1031, 95 Am St Rep 745; *Jacobson v. Lassas*, (1907) 49 Or 470, 90 P 904; *Chandler Inv. Co. v. Matlock Inv. Co.*, (1920) 95 Or 394, 187 P 1105; *Milton v. Hare*, (1929) 130 Or 590, 280 P 511; *Portland Mtg. Co. v. Cred. Protective Assn.*, (1953) 199 Or 432, 262 P2d 918.

The purchaser at a tax sale subsequent to the execution of the mortgage is a proper party defendant. *Johnson v. White*, (1912) 60 Or 611, 112 P 1083, 119 P 769.

Joining the state as a party defendant because of its status as a subsequent lienholder has no effect on its rights since this section does not imply consent by the state to

be sued. *Federal Land Bank v. Schermerhorn*, (1937) 155 Or 533, 64 P2d 1337.

## 3. Prior lienors

Though first mortgagee was made a defendant in the foreclosure of a second mortgage he was not estopped from subsequently foreclosing his mortgage since he did not appear and the complaint did not allege facts sufficient to require his appearance. *Giesy v. Aurora State Bank*, (1927) 122 Or 1, 255 P 467, 256 P 763.

If the plaintiff alleges facts showing that a prior lien should be subordinated to his lien then he has the option of making such prior lienor a party defendant. *Allen v. Baker*, (1938) 159 Or 398, 80 P2d 709.

FURTHER CITATIONS: *Besser v. Hawthorn*, (1869) 3 Or 129, 512; *United States Mtg. Co. v. McClure*, (1902) 42 Or 190, 70 P 543; *Tinsley v. Lombard*, (1904) 46 Or 9, 78 P 985, 114 Am St Rep 844.

ATTY. GEN. OPINIONS: Method of foreclosing rights of a subsequent lienor omitted as a party, 1924-26, p 112; necessary parties in mortgage foreclosures, 1932-34, p 104.

## 88.040

## NOTES OF DECISIONS

This section was not repealed by ORS 88.070. Page v. Ford, (1913) 65 Or 450, 131 P 1013, Ann Cas 1915A, 1048, 45 LRA(NS) 247; *Wright v. Wimberly*, (1919) 94 Or 1, 184 P 740.

As regards a chattel mortgage, the bringing of an action on a note secured by it does not constitute a waiver of the security, the statute merely precluding action on the note and foreclosure of the mortgage from being exercised concurrently. *Weatherly v. Hochfeld*, (1930) 133 Or 136, 286 P 588.

The right to possession of the goods covered by a chattel mortgage securing a note is suspended during the pendency of an action upon the note until judgment is entered thereon in plaintiff's favor and execution is returned unsatisfied. *Winter v. Heyden*, (1934) 149 Or 20, 36 P2d 183, 37 P2d 871.

FURTHER CITATIONS: *Beals v. Harrison*, (1924) 111 Or 147, 222 P 736; *Jesse v. Birchell*, (1953) 198 Or 393, 257 P2d 255.

LAW REVIEW CITATIONS: 17 OLR 110.

## 88.050

## NOTES OF DECISIONS

The foreclosure decree cuts off the lien that any of the defendants may have against the property and exists only against the proceeds of the sale under the decree. *Williams v. Wilson*, (1902) 42 Or 299, 70 P 1031, 95 Am St Rep 745; *Lauriat v. Stratton*, (1880) 11 Fed 107, 6 Sawy 339. But see *Jacobson v. Lassas*, (1907) 49 Or 470, 90 P 904.

A mortgagor or his grantee of the equity of redemption must be permitted to contest, in the foreclosure suit itself, the claims of codefendants setting up in their answers liens against the mortgaged property. *Ladd v. Mason*, (1882) 10 Or 308.

The court cannot determine on foreclosure between defendants jointly liable on the mortgage note, which defendant was the principal debtor and which the surety. *Hoven-den v. Knott*, (1885) 12 Or 267, 7 P 30.

A trustee of the property subject to the mortgage may, as a party defendant, set up claims of lien under the trust and may have such lien foreclosed. *United States Mtg. Co. v. Marquam*, (1902) 41 Or 391, 402, 69 P 37, 41.

A cross-complaint against a mortgagor by one of the

defendants may extend to all the property covered by the cross-complainant's lien, and need not be confined to the property covered by the original mortgage. *Id.*

A judgment lien creditor who is made a defendant in a suit to foreclose a prior mortgage must set up his lien or he will get nothing from the proceeds of the sale. *Williams v. Wilson*, (1902) 42 Or 299, 70 P 1031, 95 Am St Rep 745.

FURTHER CITATIONS: *Call v. Jeremiah*, (1967) 246 Or 568, 425 P2d 502.

## 88.060

## NOTES OF DECISIONS

See also cases under ORS 23.530.

## 1. In general

A sale of real property under a decree of foreclosure is conducted in the same manner as a sale thereof under an execution in an action. *Close v. Riddle*, (1902) 40 Or 592, 67 P 932, 91 Am St Rep 580.

This section authorizes a deficiency judgment on foreclosure of a mortgage. *Wright v. Wimberly*, (1919) 94 Or 1, 184 P 740.

## 2. "Deemed a separate decree"

Subsequent lienors who are defendants in the foreclosure suit may enforce their liens against the property which is the subject of foreclosure only through the decree in the foreclosure suit, unless such lienors also get a personal decree. *Williams v. Wilson*, (1902) 42 Or 299, 70 P 1031, 95 Am St Rep 745.

A foreclosure decree ascertaining the rights of several lienholders is a separate decree as to each only when it becomes a decree for the recovery of money. *Lauriat v. Stratton*, (1880) 11 Fed 107, 6 Sawy 339. *Contra*, *Chavener v. Wood*, (1866) 2 Or 182.

## 3. Undertaking on appeal

A decree of foreclosure and for the amount of the debt is one entire decree, and the undertaking on appeal must include a promise to pay any deficiency remaining after the sale. *German Sav. & Loan Socy. v. Kern*, (1900) 38 Or 232, 62 P 788, 63 P 1052.

The fact that an appeal is pending from the foreclosure decree does not preclude issuance of execution unless the undertaking stays the same. *Title & Trust Co. v. Sec. Bldg. Corp.*, (1930) 131 Or 648, 284 P 177.

FURTHER CITATIONS: *Landigan v. Mayer*, (1898) 32 Or 245, 51 P 649, 67 Am St Rep 521; *Johnson v. Poulson*, (1917) 83 Or 238, 154 P 685, 163 P 435.

ATTY. GEN. OPINIONS: Filing transcript of deficiency judgment, 1924-26, p 451.

LAW REVIEW CITATIONS: 27 OLR 139.

## 88.070

## NOTES OF DECISIONS

## 1. In general

This section is remedial and is to be construed liberally in favor of the class of individuals it was intended to benefit. *Wright v. Wimberly*, (1919) 94 Or 1, 184 P 740.

In a foreclosure suit the determination by the court of the amount due under the debt is not equivalent to a decree for the recovery of that amount. *Wright v. Wimberly*, (1919) 94 Or 1, 184 P 740; *Bruckman v. Healy*, (1928) 126 Or 129, 268 P 1001; *Wright v. Nothnagel*, (1939) 163 Or 156, 96 P2d 228.

When a personal judgment is entered against the mortgagor in the foreclosure of a purchase money mortgage,

the excess of the judgment over what is realized from a sale of the mortgaged realty is void. *Pierrard v. Hoch*, (1920) 97 Or 71, 184 P 494, 191 P 328; *Stretch v. Murphy*, (1941) 166 Or 439, 112 P2d 1018.

This section does not apply when the land is located in another state and the note and mortgage were executed in such state. *McGill v. Brewer*, (1930) 132 Or 422, 280 P 508, 285 P 208.

There can be no recovery for breach of contract to waive the right to assert that a mortgage is a purchase money mortgage. *Stretch v. Murphy*, (1941) 166 Or 439, 112 P2d 1018.

A court of equity may determine what portion of a debt on real and personal property is on the real property and permit a deficiency judgment as to the personal property. *Magnolia Lbr. Corp. v. Lithia Lbr. Co.*, (1965) 241 Or 65, 404 P2d 190.

## 2. Definition of purchase money mortgage

For the purposes of this section a purchase money mortgage is one given concurrently with a conveyance of land by vendee to vendor, on the same land, to secure the unpaid balance of the purchase price. *Ladd & Tilton Bank v. Mitchell*, (1919) 93 Or 668, 184 P 282, 6 ALR 1420.

Where the purchaser executes a note and mortgage to a third person and the third person then releases the vendor from a previous obligation, such mortgage is not a purchase money mortgage. *Ladd & Tilton Bank v. Mitchell*, (1919) 93 Or 668, 184 P 282, 6 ALR 1420; *Security & Inv. Co. v. Hackett*, (1935) 150 Or 85, 42 P2d 916.

Where the vendee assigns his contract to purchase land to a third person as security for his note, this section does not apply though the vendee uses the money from the third person as the initial payment on the contract to purchase. *Mt. Vernon Nat. Bank v. Morse*, (1929) 128 Or 64, 264 P 439.

## 3. Effect of assignment of mortgage

The fact that the assignee of the mortgage was an innocent purchaser for value and did not know the mortgage was a purchase money mortgage is immaterial. *Wright v. Wimberly*, (1916) 79 Or 626, 156 P 257.

Each assignee of the mortgage is to be deemed, during the term of his ownership of the lien, as the mortgagee. *Id.*

## 4. Election of remedies

(1) **In general.** The holder of a purchase money note and mortgage must elect between a foreclosure of the mortgage or an action at law to recover the amount due on the note. *Wright v. Wimberly*, (1916) 79 Or 626, 156 P 257; *Lutz v. Blackwell*, (1929) 128 Or 39, 273 P 705; *Wright v. Nothnagel*, (1939) 163 Or 156, 96 P2d 228.

(2) **What constitutes election.** Making the second mortgagee a defendant in a foreclosure suit by the first mortgagee does not prevent the second mortgagee from waiving his mortgage lien and suing on the note. *Lutz v. Blackwell*, (1929) 128 Or 39, 273 P 705; *Stretch v. Murphy*, (1941) 166 Or 439, 112 P2d 1018.

Institution of a suit to foreclose a purchase money mortgage did not bar a subsequent action at law on the note where the foreclosure suit was dismissed on motion of the mortgagee. *Union Trust Co. v. Wiseman*, (1926) 10 F2d 558.

(3) **Effect of election.** Election to maintain an action at law on the note is a waiver of the mortgage lien but judgment for the whole amount due may be recovered. *Page v. Ford*, (1913) 65 Or 450, 131 P 1013, Ann Cas 1915A, 1048, 45 LRA(NS) 247; *Walters v. Cooper*, (1914) 71 Or 139, 142 P 359; *Wright v. Wimberly*, (1919) 94 Or 1, 184 P 740; *Lutz v. Blackwell*, (1929) 128 Or 39, 273 P 705; *Stretch v. Murphy*, (1941) 166 Or 439, 112 P2d 1018; *Union Trust Co. v. Wiseman*, (1926) 10 F2d 558.

Election to foreclose the mortgage releases the mortgagor from personal liability for the debt. *Wright v. Wimberly*, (1919) 94 Or 1, 184 P 740; *Marshall v. Middleton*, (1921) 100 Or 247, 191 P 886, 196 P 830, 19 ALR 1421; *Lutz v. Blackwell*, (1929) 128 Or 39, 273 P 705; *Wright v. Nothnagel*, (1939) 163 Or 156, 96 P2d 228.

FURTHER CITATIONS: *Renard v. Allen*, (1964) 237 Or 406, 391 P2d 777; *Ward v. Beem Corp.*, (1968) 249 Or 204, 437 P2d 483.

LAW REVIEW CITATIONS: 8 OLR 289; 17 OLR 110; 29 OLR 46; 39 OLR 127; 44 OLR 329; 48 OLR 152.

#### 88.080

##### NOTES OF DECISIONS

An interest that is not subject to sale on execution is not subject to redemption from a foreclosure decree. *United States Plywood Corp. v. Alexander*, (1946) 180 Or 174, 175 P2d 460.

FURTHER CITATIONS: *Call v. Jeremiah*, (1967) 246 Or 568, 425 P2d 502.

ATTY. GEN. OPINIONS: Disqualification of sheriff to issue deed where he was mortgagor, 1924-26, p 496; status of tax lien after redemption by mortgagor, 1934-36, p 715, 1936-38, p 297; taxation of property acquired by municipality on foreclosure of delinquent street assessments, 1940-42, p 359.

#### 88.090

##### NOTES OF DECISIONS

Foreclosure of a lien may be had upon a default in any instalment where the obligation is payable by that method. *Capital Lbr. Co. v. Ryan*, (1898) 34 Or 73, 54 P 1093; *Pomeroy v. Woodward*, (1900) 38 Or 212, 63 P 194.

The court may order a sale of the whole premises to satisfy the whole debt or it may order a sale of part of the premises to satisfy the installments then due, but it cannot order a sale of the whole premises to satisfy the installments then due and make it subject to mortgagee's lien for the instalments not yet due. *Id.*

Where a sale of a portion of the property would materially impair the value of the whole, the court may refuse to decree a sale of the property to satisfy a default in instalments. *Farmers' Loan & Trust Co. v. Ore. & Calif. R. Co.*, (1885) 24 Fed 407.

The object of this section was to provide an exclusive method of foreclosing instalment liens. *Cary v. Metropolitan Life Ins. Co.*, (1933) 141 Or 388, 17 P2d 1111.

FURTHER CITATIONS: *Lyons v. Chaffee*, (1916) 79 Or 485, 154 P 688.

#### 88.100

##### NOTES OF DECISIONS

A foreclosure commenced for nonpayment of some instalments must be dismissed on payment of the overdue instalments with interest and accrued costs and disbursements. *Pomeroy v. Woodward*, (1900) 38 Or 212, 214, 63 P 194.

#### 88.110

##### NOTES OF DECISIONS

###### 1. In general

The statute does not operate against the state where it is the real party in interest. *State Land Bd. v. Lee*, (1917)

84 Or 431, 165 P 372; *Day v. Celoria*, (1925) 116 Or 250, 241 P 58.

This section was enacted to remove from titles the uncertainty created by unsatisfied mortgages of record. *Force v. Heusner*, (1933) 142 Or 280, 18 P2d 583.

This provision was designed to protect innocent purchasers and lien claimants and should be reasonably construed and given full effect. *Title & Trust Co. v. Nelson*, (1937) 157 Or 585, 71 P2d 1081, 114 ALR 1196.

Where a special statute of limitation governs mortgage foreclosures, the equitable principle of laches is not applicable to a delay in foreclosure short of the statutory period. *McKinnon v. Bradley*, (1946) 178 Or 45, 165 P2d 286.

##### 2. Application and operation

A second mortgage became a first lien after expiration of 10 years from the maturity of the note to secure which the first mortgage was given. *Zanietta v. McCulloch*, (1929) 130 Or 396, 280 P 328.

Where a second mortgage was given to allow the owner of the mortgaged property to discharge a first mortgage, and the owner concealed the existence of junior lien, an action by the second mortgagee seeking subrogation to the position of the first mortgage lienholder was not barred where suit was begun before statute would have run on the first mortgage. *Metropolitan Life Ins. Co. v. Craven*, (1940) 164 Or 274, 101 P2d 237.

Where mortgage recited June 15, 1941 as date of maturity and some of the notes secured by the mortgage matured prior to that date, the maturity of the entire obligation was June 15, 1941, as this section indicates an intent to treat the obligation as a unit. *Portland Trust & Sav. Bank v. Lincoln Realty Co.*, (1946) 180 Or 96, 170 P2d 568.

##### 3. Extension agreements

A mortgage extended after expiration by a recorded agreement based on valuable consideration is valid and may be foreclosed within 10 years after the date to which extended. *Richey Loan Co. v. Cheldelin*, (1934) 148 Or 170, 34 P2d 646; *Title & Trust Co. v. Nelson*, (1937) 157 Or 585, 71 P2d 1081, 114 ALR 1196.

An extension agreement not signed by mortgagee may be accepted by his act or conduct. *Title & Trust Co. v. Nelson*, (1937) 157 Or 585, 71 P2d 1081, 114 ALR 1196.

Forbearance from foreclosure suit was sufficient consideration to support an extension agreement wherein a subsequent party assumed note and expired mortgage. *Id.*

The recording of deeds containing agreements by grantees to assume and pay the mortgage was a sufficient recordation of the extension agreement. *Tuthill v. Stoehr*, (1940) 163 Or 461, 98 P2d 8.

FURTHER CITATIONS: *Hydraulic Min. Co. v. Smith*, (1921) 100 Or 86, 196 P 811.

ATTY. GEN. OPINIONS: Presumption of payment after 10 years, 1924-26, p 4, 1944-46, p 476; effect of statute of limitations on mortgage executed to the state in case of assignment to private person, 1926-28, p 7; renewal of mortgage executed to state, 1928-30, p 617, 1930-32, p 462.

LAW REVIEW CITATIONS: 11 OLR 236; 12 OLR 343; 27 OLR 344.

#### 88.120

##### NOTES OF DECISIONS

###### 1. In general

This section was designed to protect the rights of mortgagees and of third persons whose liens attached "subsequent to expiration of the 10 year period." *Force v. Heusner*, (1933) 142 Or 280, 18 P2d 583.

## 2. Application and operation

A person commencing a foreclosure suit more than 10 years after maturity of the debt, must allege and prove that a payment of either principal or interest has been voluntarily made within the preceding 10 years, that the mortgaged property is still owned by the original mortgagor and that no right of a third party has attached to the land after the expiration of the 10 year period. *Richey Loan Co. v. Cheldelin*, (1934) 148 Or 170, 34 P2d 646.

Payment of interest does not bar the running of the statute of limitations where the original mortgagor no longer owns the premises. *Tuthill v. Stoehr*, (1940) 163 Or 461, 98 P2d 8.

Plaintiff was not barred from foreclosure by reason of original mortgagor's no longer having title, where defendant for valuable consideration had assumed the mortgages. *Richey Loan Co. v. Cheldelin*, (1934) 148 Or 170, 34 P2d 646; *Tuthill v. Stoehr*, (1940) 163 Or 461, 98 P2d 8.

Foreclosure was not barred where interest was paid within 10 years of suit, defendant's purchase from mortgagor's grantee was prior to expiration of the 10 year period following date of maturity of note and mortgage, but original mortgagor no longer owned the property. *Day v. Cectoria*, (1925) 116 Or 250, 241 P 58. **But see** *Richey Loan Co.*

*v. Cheldelin*, (1934) 148 Or 170, 34 P2d 646 and *Tuthill v. Stoehr*, (1940) 163 Or 461, 98 P2d 8.

Foreclosure was barred where interest payments were made within 10 years but a second mortgage attached to the property still owned by original mortgagors subsequent to the expiration of the 10 year period. *Zanietta v. McCulloch*, (1929) 130 Or 396, 280 P 328.

Where interest was paid on first mortgage within 10 years of suit and a second mortgage attached prior to the expiration of 10 years following the maturity of the first mortgage, but title was no longer in the original mortgagor, foreclosure was not barred. *Force v. Heusner*, (1933) 142 Or 280, 18 P2d 583. **But see** *Tuthill v. Stoehr*, (1940) 163 Or 461, 98 P2d 8.

Where at time of suit interest had been paid within 10 years, original mortgagor was still owner and no intervening rights had attached after the 10 year period, a conveyance by the mortgagor to a third party after the foreclosure decree did not defeat the mortgage lien. *Versteeg v. Pratt*, (1933) 144 Or 485, 25 P2d 387.

**FURTHER CITATIONS:** *Title & Trust Co. v. Nelson*, (1937) 157 Or 585, 71 P2d 1081, 114 ALR 1196.