

Mortgaged Property — Sale of — Whether Purchaser Liable Criminally.

Sections 8291 and 11416 of the Revised Codes of 1921 construed as not placing criminal responsibility upon a person for buying mortgaged property.

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Cut Bank, Montana.

My dear Mr. Shannon:

You have requested the opinion of this office as to whether the provisions of Section 8291, Revised Codes of 1921, or Section 8689, Revised Codes of 1907 (Sec. 11416, Rev. Codes of 1921), or either of them, apply to the purchaser of mortgaged property under the following circumstances:

"A executes a chattel mortgage to B and with the oral consent of B sells the mortgaged property to C who knows of the existence of the chattel mortgage, and takes the property with the oral understanding that he is to pay the amount due upon the mortgage. C subsequently secretes the property, or removes or sells the same, or a portion thereof, and B forecloses his chattel mortgage, securing a deficiency judgment. C refuses to disclose the whereabouts of the property at the present time."

The provisions of Section 8291 referred to are as follows:

"Any person who has executed a mortgage upon personal property, except locomotives, engines, rolling-stock of a railroad, steamboat machinery, and vessels in actual use, who shall, during the existence of the lien or title created by such mortgage, remove the same from the county where said property was situated at the time of the execution of the mortgage, or in case of a mortgaged crop, from the land on which the same was grown, or sell or remove said property or crop, or any part thereof, without the consent in writing of the mortgagee first had and obtained, shall be guilty of a misdemeanor, but if such sale be made, or removal had, with intent to deprive the mortgagee of his claim thereto, or interest therein, such person is guilty of larceny, and shall be punished in the same manner and to the same extent as for larceny of the property so removed or disposed of."

while Section 11416 Revised Codes of 1921 provides:

"Every person who, after mortgaging any personal property, except railroad locomotives, railroad engines, rolling-stock of a railroad, steamboat machinery in actual use and vessels, removes or causes to be removed, or permits the removal of such mortgaged property from the county, where it was situated at the time it was mortgaged, without the written consent of

the mortgagee, with the intent to deprive the mortgagee of his claim thereto and interest therein; and every person who, after mortgaging any personal property of any kind or character whatsoever, voluntarily sells or transfers any such mortgaged property without the written consent of the mortgagee, and with the intent to defraud such mortgagee of his claim thereto and interest therein, or with the intent to defraud the purchaser thereof, of any money or thing of value, is guilty of larceny."

It is apparent that both of these sections are aimed at the person mortgaging the property and are intended for the protection of the mortgagee, and that if the mortgagee waived the protection afforded by the provisions of these sections, or either of them, by consenting to the sale of the mortgaged property, that the penalty does not attach to the person who purchased the mortgaged property. The mortgagee had a right to foreclose his mortgage when notified of the sale, or to acquire a new mortgage from the purchaser, who is then subject to the provisions of these sections. Not having done so, I am of the opinion that no criminal responsibility attaches to the purchaser under either of these sections under the facts that you have submitted.

Very truly yours,

WELLINGTON D. RANKIN,
Attorney General.