

Opinion No. 107

Department of State Lands and Investments—Mortgages—Acceptance of Quit Claim Deed by Mortgagee—Intervening Liens and Encumbrances—Duration of Lien.

HELD: The state by accepting a quit claim deed from the owner of lands mortgaged to the state and by failing to renew its mortgage lost its interest in the lands mortgaged which were sold by the holders of subsequent liens and encumbrances.

July 26, 1939.

Mrs. Nanita B. Sherlock
Commissioner of State Lands and Investments
The Capitol

Dear Mrs. Sherlock:

Re: Farm Loan No. 901

Relative to the above farm loan covering the following described lands in Phillips County,

Lots 1, 2, 7, 8, 9 and 10 in Section Four; Lot 5 of Section Three, in Township Twenty-nine, North of Range Thirty, E.M.M. and the Southeast quarter of the Southeast quarter of Section Thirty-three, Township Thirty, North of Range Thirty, E.M.M. containing 281.96 acres,

I wish to report as follows:

On September 5, 1918, Verna M. Johnson and Albert D. Johnson, her husband, gave a mortgage on this land to the State of Montana, securing the sum of \$1600 at 6% interest due September 5, 1928, as appears from Item 12 of Abstract of Title No. 1229 by Phillips County Abstract Company certified November 2, 1918.

In a memorandum of title by Noylan Abstract Company, Malta, Montana, compiled July 14, 1939, I find that the above named mortgagors conveyed their interest in this land to Luis Pecora by quit claim deed dated October 24, 1927, filed of record December 19, 1927. Thereafter on May 17, 1928, the land was attached by the Havre Merchants Association in an action against Pecora for \$200 interest and costs. In June, 1928, the land was levied upon by writ of execution in this action for \$389.38. On August 8, 1928, it was levied upon by writ of execution in an action by James M. Johnson v. Luis Pecora and Mary Pecora for \$388.43. On August 31, 1929, it was sold at sheriff's sale to James M. Johnson for \$402.93. A sheriff's deed to purchaser was filed September 19, 1936, for this sum.

On June 18, 1929, the State of Montana accepted and on June 27, 1929, filed a quit claim deed from Luis Pecora and Mary Pecora, his wife. On September 12, 1936, James M. Johnson gave a mortgage to the Northern Montana Association of Credit Men of Great Falls, Montana, to secure the sum of \$800, which was afterwards foreclosed and sold to mortgagee on May 22, 1937, for \$1053.89; lis pendens being filed November 12, 1936.

The question presented is what is the present interest of the State of Montana in the said lands? (1) Was there a merger of the mortgage and the fee? (2) If not, is the mortgage still valid? The question whether a conveyance of the equity to the mortgagee results in a merger of the mortgage and fee is primarily one of the intention of the mortgagee (41 C. J. 776, Section 872.) If there was a merger the state took the lands subject to the other liens and encumbrances (Id. 775, Sec. 869). If we take the position most favorable to the state and assume that there was no merger, the mortgage nevertheless would be no longer a lien for the reason that it was not renewed within eight years from maturity of the note (Section 8267). The mortgage ceased to be valid on September 6, 1936, eight years after the maturity of the note. If we assume that the quit claim deed was taken and accepted as a mortgage (a position difficult for the

state to maintain, since it has assumed to be the owner of the land and has leased it and accepted the rental ever since the deed was given and has not attempted to collect the original debt), it would be subject to the prior liens and encumbrances above mentioned, under which the land was sold.

It is therefore my opinion that the state has no interest in said lands.