

January 1944

Judicial History and Present Status of Section 8267, Montana Statutes

Leif Erickson

Associate Justice of the Supreme Court of the State of Montana

Follow this and additional works at: <https://scholarworks.umt.edu/mlr>



Part of the [Law Commons](#)

Let us know how access to this document benefits you.

Recommended Citation

Leif Erickson, *Judicial History and Present Status of Section 8267, Montana Statutes*, 5 Mont. L. Rev. (1944).

Available at: <https://scholarworks.umt.edu/mlr/vol5/iss1/10>

This Article is brought to you for free and open access by ScholarWorks at University of Montana. It has been accepted for inclusion in Montana Law Review by an authorized editor of ScholarWorks at University of Montana. For more information, please contact scholarworks@mso.umt.edu.

Montana Law Review

VOLUME V.

SPRING, 1944

Mortgages

Judicial History and Present Status of Section 8267, Montana Statutes

LEIF ERICKSON*

When Shylock demanded his pound of flesh he was foreclosing his mortgage. He was taking the pound of flesh which had been pledged by Antonio as security for his debt. As barbarous a thing as that transaction was, yet it actually was following the ordinary business practice that has been in existence since the time when man first wanted something but did not have the wherewithal with which to pay for it.

All sorts of property have been used as security by borrowers, some of them even pledging their wives! The borrowing of money and the giving of security is so much a part of human activity that it is doubtless but that every individual at some time during his life becomes an active participant in such a transaction.

In the early days in England, the borrower duly transferred possession of the security, this being known as a gage or pledge. If the lender was to repay himself out of the rents or profits of the security, the agreement was known as a *vivum vadium* or living gage. But if the rents or profits were to be retained by the lender without any reduction of the obligation, the agreement was called a *mortuum vadium* or dead gage and hence, mortgage.

Land has always been a popular subject of mortgages—undoubtedly due to its availability and stability. Early day notions of seisin and estates made real estate mortgages quite complex, and so along about the time Columbus discovered America, we find Littleton¹ reducing the mortgage to a form

*Associate Justice of the Supreme Court of the State of Montana.

¹Coke upon Littleton (1853), Sec. 205a, is as follows:

"If a feoffment be made upon such condition that if the feoffor pay to the feoffee at a certain day, etc. 40 pounds of money, that then the feoffor may re-enter, etc. in this case the feoffee is called a tenant in mortgage . . . and if he doth not pay, then the

understandable to the attorneys of that period. It was a conveyance in fee simple and is doubtless the forerunner of the modern title theory.

In America, however, the prevailing view is that a mortgage passes no title, but that it creates a lien. As a result of this position, the lien and the debt are thought of separately and may be independent of each other in the matter of expiration. As we shall see later, many states have special statutes on the subject of the duration of the lien of a mortgage.

The law in Montana with relation to the duration of the lien of a mortgage upon real estate is much confused as a result of different interpretations placed upon Section 8267, the statute in point. This article will attempt to present the problem which the legislature was seeking to correct, and to trace and comment upon the various constructions of the statute since its enactment in 1913^a and its amendment in 1933.^b

At the common law the lien of a mortgage was not extinguished by the lapse of the period within which an action to enforce payment of the debt could have been maintained. However, the Montana legislature saw fit to change this in 1895, when Section 8243, Revised Codes, was enacted, the provision being that the lien is extinguished by the lapse of time which makes the principal obligation unenforceable.

Under this state of the law, therefore, the mortgage would continue to live only so long as did the principal obligation. However the mortgage, if not cancelled would remain a cloud on the title of the property mortgaged, and extrinsic evidence would thus be required to disclose payment of the debt and extinguishment of the mortgage lien. With such a situation existing, it would be necessary in many cases for one interested in the property or in acquiring an interest therein, to rely on what facts he might be able to secure from the parties to the instrument in order to determine whether the mortgage as shown by the record was still of any effect. In other words, by 1913 real estate records were "chuck-full" of stale mortgages.

It was in view of this that Section 8267 was enacted, providing as follows:

"Every mortgage of real property made, acknowledged and recorded, as provided by the laws of this State, is

land which is put in pledge upon condition for the payment of the money is taken from him forever, and so dead to him upon condition, etc. And if he doth pay the money, then the pledge is dead as to the tenant, etc."

^aChapter 27, Session Laws of 1913.

^bChapter 104, Session Laws of 1933.

MORTGAGES

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, his heirs, executors, administrators, representatives, successors, or assigns, shall within sixty days after the expiration of said eight years file in the office of the County Clerk and Recorder where said mortgage is recorded, an affidavit, setting forth the date of said mortgage, when and where recorded, the amount of the debt secured thereby, and the amount remaining unpaid, and that the said mortgage is not renewed for the purpose of hindering, delaying or defrauding creditors of the mortgagor or owner of the land, and upon the filing of said affidavit, the said mortgage shall be valid against all persons for a further period of eight years.”

Other statutes in force at that time were Section 9029, enacted in 1889, providing that an action upon any contract, obligation, or liability, founded upon an instrument in writing, must be commenced within eight years, and Section 8264, enacted in 1895, providing that 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. In 1933 the Legislature, for reasons satisfactory to itself, amended Section 8267 by striking out the words “as against the creditors of the mortgagor or owner of the land mortgaged, or subsequent purchasers or encumbrancers,” and substituted for them the words, “as against all.”

Attention will be paid to the questions of whether Section 8267 is a statute of limitations or is a recording statute, against whom it is applicable, by whom it may be invoked, and whether it is an exclusive method of extending a mortgage. All of these matters have been passed upon by the court. With this background let us see what the court has held and said on the occasions when the statute has been before it.

The statute was first before the court in 1916 in the case of *Berkin v. Healy*.⁵ In that case the lien of mortgage had expired before the enactment of the statute and it was held that Section 8267 did not enable a mortgagee in such circumstances to revitalize his security by complying with its terms and that such a law would be unconstitutional under the 14th amendment.

⁵2 Mont. 398, 158 P. 1020.

The first time the meaning of the statute was inquired into was in 1924 in *Morrison v. Farmers' & Traders' State Bank*.⁴ It was held that Section 8267 is not a recording statute, affecting notice, but is a statute of limitations, affecting the remedy, the effect of which is that a mortgage, in the absence of the renewal affidavit, ceases to be of binding force as against the persons mentioned and becomes unenforceable by the lapse of eight years from the maturity of the debt or obligation secured. It was further held that the statute, construed as above, was not open to any attack on constitutional grounds.

In the same year, in the case of *First National Bank of Missoula v. Marlowe*,⁵ it was held that Section 8267 could have no application in any case in which the record is silent as to when the debt matured.

In 1927, *Corwin v. Brainard*,⁶ held that after a mortgagee had complied with Section 8267 and extended the life of his mortgage, he might foreclose at his pleasure. It was further said that Section 8267 refers only to the extension of the lien of mortgage and that as between the mortgagor and mortgagee the mortgage is good so long as the debt be kept alive. The court also held that Section 8267 is not an exclusive method of extending a mortgage but that the same could be accomplished under the authority of Section 8264 with the formalities required in a grant of real property.

In *Vitt v. Rogers*,⁷ also in 1927, the court held that under Section 8267, the life of a mortgage could only be extended by the mortgagee, since the legislature's purpose was to limit the life of a mortgage unless it was extended.

In 1928, *Pereira v. Wulf*⁸ held that where a mortgagee fails to file the renewal affidavit as required by Section 8267, the land is freed from the burden of the mortgage debt. Foreclosure by the mortgagee was resisted by a subsequent purchaser of the land and there was no issue of notice raised. *Skillen v. Harris* (1929)⁹ substantiates the *Pereira* and *Corwin* cases. In *Turner v. Powell* (1929)¹⁰ the words "subsequent purchasers" in Section 8267 were construed and it was held that the term as therein used did not embrace one who takes property while the lien is yet subsisting and who expressly takes the property subject to the mortgage.

⁴70 Mont. 146, 225 P. 123.

⁵71 Mont. 461, 230 P. 374.

⁶80 Mont. 318, 260 P. 706.

⁷81 Mont. 120, 262 P. 164.

⁸83 Mont. 343, 272 P. 532.

⁹85 Mont. 73, 277 P. 803.

¹⁰85 Mont. 241, 278 P. 512.

MORTGAGES

In 1931 the statute was given a new twist in the case of *Hastings v. Wise*.⁸⁹ In that case a debt had been extended for ten years prior to maturity but no recording was made until after maturity. A purchaser of the land contended that Section 8267 could be invoked to bar the mortgage but the court held otherwise, basing its decision on the fact that there had been actual notice. In the same year, *Jones v. Hall*⁹⁰ held that Section 8267 affects only the lien of the mortgage; that it does not extend the life nor affect the debt which the mortgage is given to secure.

In 1932 the *Hastings* case, *supra*, was again before the court, an issue being whether Section 8267 was an exclusive method of extending a mortgage and it was held not, in view of Section 8264, citing the *Corwin* and *Vitt* cases.

Reed v. Richardson,⁹¹ decided in 1933, was a case in which a plaintiff who held a first mortgage sought to foreclose against a defendant who held under a quitclaim deed from the purchaser on the foreclosure of a second mortgage. Defendant urged that plaintiff had failed to comply with the provisions of Section 8267, but did not plead the general statute of limitations. It was held that in order to bar the debt the general statute should have been pleaded, overruling the *Morrison* case (*supra*). It was further held, (1) that Section 8267 did not apply as between the parties, citing *Corwin v. Brainard* and *Skillen v. Harris* and (2) that defendant was not a "subsequent purchaser" within the meaning of Section 8267, citing *Turner v. Powell*. Here the defendant did not take the property subject to the mortgage so that the court is holding that the only persons who could be subsequent purchasers within the meaning of the statute are those who became such after the statutory period had elapsed. In application this would make it difficult to interest a third party in mortgaged property since he never could be sure that some fact not of record such as non-residence, or part payment, hadn't tolled the statute.

Since the *Reed* case had been commenced before the passage of the 1933 amendment, the court had no opportunity to apply it, but obviously felt that under the amended statute, a different result might be reached, for the court said:

"It is pertinent to observe that at the recent session of the legislative assembly the section was amended (Senate Bill No. 199, Chapter 104, Laws of 1933). Many of

⁸⁹Mont. 325, 297 P. 482.

⁹⁰Mont. 69, 300 P. 232.

⁹¹Mont. 34, 20 P. (2d) 1054.

the points involved in this case and in other cases mentioned will not be troublesome in the future."

In the same year *Leffek v. Luedeman*¹⁹⁵ held that the administrator of an insolvent estate may assert the invalidity of a mortgage because of noncompliance with Section 8267, the reason being that the administrator mainly represents the creditors, and only technically represents the deceased so that this case does not do violence to the rule that Section 8267 does not apply as between the parties.

*First National Bank of Whitefish v. Gutensohn*¹⁹⁶ was a 1934 case in which the bank held a mortgage dated 1922 to secure a note. The note was renewed in 1924 and 1926 but the mortgage was never renewed. Within the eight year period defendant took a mortgage to secure a note in satisfaction of a judgment against mortgagor and contended in answer to an action by the bank, after the eight year period, to foreclose its mortgage, that his was superior by virtue of Section 8267. The court held for the bank since the administrator acquired his mortgage while that of the bank was valid and subsisting and was in no position to assert its invalidity, citing *Turner v. Powell* and *Reed v. Richardson*, *supra*.

In 1935 the statute was four times before the court in the cases of *Register Life Ins. Co. v. Kenniston*,¹⁹⁷ *Hillsdale College v. Thompson*,¹⁹⁸ *Humbird v. Arnet*,¹⁹⁹ and *Frisbee v. Coburn*.²⁰⁰ In the first a mortgage was extended under Section 8264 and it was contended that an extension under Section 8264 could not operate to renew the mortgage for a period longer than as provided in Section 8267. However it was held that while the two sections are in *pari materia*, one is not incorporated into the other. Under this holding, a mortgage could be extended under Section 8264 for any length of time that the parties see fit and would remain valid so long as the debt was kept alive. However, while apparently limitless, the holding is tempered by the fact that no mortgagee would agree to an unusually long extension unless of course he was holding the mortgage solely for income purposes. The *Hillsdale College* case was one where

¹⁹⁵Mont. 457, 27 P. (2d) 511, 91 A. L. R. 286. See also *Missoula Trust & Savings Bank v. Boos*, 106 Mont. 294, 77 P. (2d) 385, in which the doctrine of the *Leffek* case was extended, the court now holding that an administrator must set up Section 8267, and that failure to do so would be constructively fraudulent against the creditors.

¹⁹⁷Mont. 453, 37 P. (2d) 555, 97 A. L. R. 731.

¹⁹⁸Mont. 191, 43 P. (2d) 251.

¹⁹⁹Mont. 400, 44 P. (2d) 753.

²⁰⁰Mont. 499, 44 P. (2d) 756.

²⁰¹Mont. 58, 52 P. (2d) 882.

MORTGAGES

the defendant bought the mortgagor's interest before the expiration of the eight year period and contended he was the owner of the property free and clear of the mortgage after the expiration of the period. The court held that his rights were subject to the mortgage, citing *Turner v. Powell* and *Reed v. Richardson*. It was further held that although defendant was a creditor before he bought the mortgagor's interest, his status in regard to the property was that of a purchaser.

The *Humbird* case held that where mortgaged realty was acquired within the eight year period, the transferee could not invoke Section 8267 until after the debt is barred under the general statute of limitations, Section 9029. The last case, *Frisbee v. Coburn*, holds in regard to Section 8267 that an allegation negating the filing of the renewal affidavit is a necessary part of a pleading seeking to rely on the statute.

Breese v. O'Brien,²⁰ a 1936 case, held that as between mortgagor and mortgagee and those acquiring title through the mortgagee, the filing of a renewal affidavit is not necessary so long as the obligation secured by the mortgage is kept alive, citing *Leffek v. Luedeman, supra*. In the same year the court reaffirmed its previous holding that as between the mortgagor and mortgagee, the mortgage is not barred so long as the debt is kept alive.²¹

Rieckhoff v. Woodhull (1937)²² holds that regardless of what is done about renewal, a mortgage cannot exist longer than the debt it is given to secure.

Aitken v. Lane,²³ a 1939 case, was a case in which land was quitclaimed more than eight years after the maturity of the mortgage note. There was an extension which had been made in pursuance of Section 8264 but which had not been recorded. The holder of the quitclaim deed contended that he could rely on the record and set up Section 8267. It was so held. In *Siuru v. Sell*,²⁴ decided the same year, it was held that a declaration of homestead was effective against a levy of execution under a judgment of foreclosure of a mortgage which had not been renewed within the statutory period where the declaration of homestead was made before entry of judgment.

In 1941, the case of *Swingley v. Rieckhoff*²⁵ held that the mortgagor could not have his title quieted against a mortgagee

²⁰102 Mont. 547, 59 P. (2d) 65.

²¹*Sommer v. Wigen* (1936) 103 Mont. 327, 62 P. (2d) 333.

²²106 Mont. 22, 75 P. (2d) 56.

²³108 Mont. 368, 92 P. (2d) 628.

²⁴108 Mont. 438, 91 P. (2d) 411, 123 A. L. R. 423.

²⁵112 Mont. 59, 112 P. (2d) 1075.

who had allowed the statutory period to expire without renewing the mortgage unless such mortgagor first reimbursed the mortgagee for the amount of the taxes paid by him to prevent loss of title to the county. The court based its decision on the theory that the mortgagee became subrogated to the county's tax lien, but without the right to impose any penalty for delinquency.

The last construction of the statute is in *Western Holding Co. v Northwestern Land & Loan Co.*²⁶ The mortgagors, after giving a mortgage in 1917, conveyed to a loan company in 1924, subject to the mortgage. In 1928 the loan company conveyed to another who reconveyed to the loan company in 1933. Both of these conveyances contained a recital that they were subject to the mortgage. A renewal under Section 8267 was filed in 1931, some fourteen years after the original mortgage. The action was commenced in 1935 by the mortgagee, praying for foreclosure. The loan company contended that the renewal had been too late and that the mortgage was barred. The court held that a conveyance subject to the mortgage, thereby extended the mortgage so that in this case it would not expire until 1941, as the last conveyance was in 1933. The court did not pass on the 1933 amendment to the statute except to say that it would be unconstitutional if the legislature intended to deprive a mortgagee of his right to foreclose without giving him a reasonable time to commence suit.

Early in its life, then, the statute was believed by the court to be one of limitation and applicable even as between the parties. Then by later decisions it excluded the parties from the terms of the statute, and went on to reach the result that Section 8267 could not apply in any case where the parties dealt with the property on the basis of an existing mortgage and finally said flatly that it was a recording statute.

Keeping this in mind, let us see how this problem has been treated in other states. Some have done nothing so that the common law rule that a mortgage lien may be enforced after the expiration of the debt would be applicable.²⁷ Others have provided that the mortgage expires with the debt.²⁸ These states, therefore, take the position, with respect to this problem, of Montana in the period from 1895 to 1913.

Several jurisdictions have statutes relating to the duration of the lien of a mortgage but the wording of none is similar to

²⁶(1941) 113 Mont. 24, 120 P. (2d) 557.

²⁷See 37 C. J., *Limitations of Actions*, p. 703, §23, for a discussion and a citation of cases.

²⁸37 C. J., *Limitations of Actions*, p. 704, §24.

MORTGAGES

ours.²⁹ These statutes fall into two classes, the one providing that the mortgage shall have no effect whatsoever after the period prescribed in the statute, and the other providing that the constructive notice given by recording shall be limited to the period prescribed in the statute. The former is usually re-

²⁹The Minnesota statute, enacted in 1909 is as follows: "No action or proceeding to foreclose a real estate mortgage, whether by action or advertisement, or otherwise, shall be maintained unless commenced within fifteen years from the maturity of the whole of the debt secured by said mortgage, and this limitation shall not be extended by the non-residence of any plaintiff or defendant or any party interested in the land upon which said mortgage is a lien in any action commenced to foreclose such mortgage, nor by reason of any payment made after such maturity, nor by reason of any extension of the time of payment of said mortgage or the debt or obligation thereby secured or any portion thereof, unless such extension shall be in writing and shall have been recorded in the same office in which the original mortgage is recorded, within the limitation period herein provided, or prior to the expiration of any previously recorded extension of such mortgage or debt, nor by reason of any disability of any party interested in such mortgage." (MINN. STAT. [Mason, 1927] 9188.)

This statute is used as a pattern by the Commissioners on Uniform State Laws for Section 12 of the UNIFORM REAL ESTATE MORTGAGE ACT which is as follows: "(1) 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.

(2) Such period shall be extended only by an extension of the mortgage duly executed by the owner of the mortgaged premises and recorded before the period of limitation expires, and shall not be extended by other agreement, non-residence, disability, partial payment or otherwise.

(3) If an action or proceeding to foreclose has been begun before the expiration of such period, it may be continued and completed thereafter but it shall be void as to a person who in good faith becomes a purchaser or encumbrancer of the premises without actual or constructive notice thereof.

(4) This section shall not apply to a mortgage in the form of an absolute deed, unless such deed and the separate instrument operating as a defeasance are both recorded at least one year prior to the time when the period of limitation would expire if it applied."

Other existing statutes are as follows: Colorado, LAWS of 1933, Ch. 155, p. 798; Idaho, 1932 CODE, §44-1102, §44-1103; Illinois, SMITH-HURD ANN. STAT. Ch. 83, §11b; Indiana, ACTS of 1937, Ch. 97, p. 467; Iowa, 1931 CODE, §11028; Kentucky, CARROLL'S KY. STAT. (1930), §2514; Michigan, PUBLIC ACTS, 1929, Ch. 38, p. 71; North Carolina, 1939 CODE, §2594 (5); Ohio, OHIO GEN. CODE (Page, Lifetime Ed.), §8546-2; Oregon, COMP. LAWS ANN. (Bancroft, 1940), §68-111, §68-112, §68-113; Virginia, ACTS OF ASSEMBLY, 1942, Ch. 331, p. 504.

It is thus seen that this problem has been the subject of considerable legislation, the majority of which, and on what is believed to be the sounder reasoning, follows a limitation theory.

ferred to as a statute of limitations and the latter is often called a recording statute.

Montana, being in a position of having a statute so ambiguous as to permit either construction, has the opportunity to observe which type is the more effective and under which the best results are achieved.

Construed as a recording statute, the only effect of Section 8267 would be to limit the period during which the record furnishes constructive notice of the rights of the mortgagee. The effect of this is that anyone dealing with the property after the expiration of eight years would have to avoid inquiring into the question of whether the debt had been paid, if he wished to be protected by Section 8267. However, construed as a statute of limitation, the lien of a mortgage would expire in eight years. It is safe to say that such a result was intended by the legislature especially in view of the 1933 amendment providing that a mortgage "shall be good as against all 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 renewed. Further, if the words "no longer" mean anything, the legislature did not intend that exceptions should be made for cases wherein appear facts outside the record such as non-residence, part payment or acknowledgment of the debt. In other words, the lien would be terminated absolutely in eight years, if not renewed of record.

If we are to rid the records of stale mortgages, if we are to preserve an up-to-date and informative record, it can best be done by construing the statute as one of limitation, and include within it even the parties themselves. This result has been recommended by the National Conference of Commissioners of Uniform State Laws³⁰ as the only effective method of clearing the record and should be adopted in Montana to replace the confusing and contradictory constructions now existing in the decisions interpreting the statute, thus taking a step toward the security and certainty of record titles.³¹

³⁰See, Report of the Committee on a UNIFORM REAL ESTATE MORTGAGE Act, Handbook of 1927, p. 656 (§12).

³¹Interesting to note in connection with the legislative intent are the comments made by the Hon. H. A. Simmons, Senator from Carbon county and author of the 1933 amendments, made at that session of the legislature. That statement, which Senator Simmons has been kind enough to allow me to use, is as follows:

"The purpose of this bill when it was enacted in 1913 was to enable a person to ascertain from the records in the office of the county clerk whether a mortgage after the lapse of eight years from its maturity (plus sixty days, the time given to renew it), was still in existence.

MORTGAGES

11

“Under the law as it existed prior to that time, no one could tell whether a mortgage appearing on the records, not *canceled*, was alive or not.

“The language of the statute contemplated that a mortgage from the time recorded should be good ‘until eight years after the maturity of the entire debt or obligation secured thereby, and no longer,’ unless an affidavit be filed as provided by the statute. A difficulty has arisen because of the inclusion in the Act of the words, ‘is thereby good and valid as against the creditors of the mortgagor, or owner of the land mortgaged, or subsequent purchasers or encumbrancers.’ The inclusion of that sentence has made the law obscure and difficult to construe. The decisions of the Supreme Court, intended to interpret the law, have, in the opinion of many lawyers cast further doubt upon its real intent and meaning.

“A person ought to be able to go to the office of the county clerk and find out whether a mortgage eight years and sixty days old is good and valid or not.

“The proposed bill will make the statute certain in its operation.

If the owner of a mortgage does not care enough about it to file an affidavit of renewal at the end of eight years from its maturity, he ought to lose his lien.”