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The Uniform Mortgage Act

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THE UNIFORM MORTGAGE ACT.

The fifth draft of the Uniform Mortgage Act which dealt chiefly with statutory phases of the law of real property mortgages, was presented to the National Conference of Commissioners on Uniform State Laws at the Detroit meeting in August, 1925, by the special committee which had it in charge. It failed to receive the votes of the necessary number of states for its adoption.

During the five years that the committee was working on this act, the various drafts were submitted to the leading authorities on the subject of mortgages and numerous changes were made as a result. In that way defects in the original drafts were eliminated and the benefits of the constructive criticism offered were conserved. The committee spared no pains to perfect the proposed legislation and to make the final draft acceptable to as many as possible.

The final draft had received the approval of nearly all the organizations that are interested in real property mortgages. It had been endorsed by the National Association of Real Estate Boards, the American Title Association, the insurance companies, and the teachers of mortgage law in the leading law schools of the country.

Of all the fields of law that the National Conference of Commissioners on Uniform State Laws has entered since its organization in 1892 for the purpose of drafting legislation for the approval of the American Bar Association and the ultimate submission to the legislatures of the various states for adoption, that of real estate mortgages would seem to be as promising as any, if not promising than any other. Whatever may be one's view as to the advisability of codifying certain branches of the common law, as this organization has undertaken to do, there seems to be less objection in the case of mortgages than in any other subject. Already in every state a considerable portion of mortgage law is incorporated in statutes or codes; and since mortgage loans on real estate have long since ceased to be limited by state boundaries, all the arguments for uniform legislation in commercial subjects, such as negotiable instruments and sales, would seem to apply with equal, if not greater, force to
mortgages. The great wonder is, not that the National Conference of Commissioners failed to approve the draft submitted to it in August, 1925, but that it had not long since recommended such an act to the American Bar Association for adoption by the several state legislatures.

The draft, on which the special committee put over four years of labor, is well worth a careful study by the lawyers of Kentucky for it may be of interest to them to see what changes would be brought about if such an act were to be adopted in this state.

In the first place it should be understood that it was not the purpose of the drafters of this act to codify the substantive law of mortgages but rather to embody in the proposed uniform legislation, those phases of the law that are most often found in statutes. The first part of the act deals with general provisions such as the nature of mortgages, the statute of limitations and the penalties for impairment of security. Part II covers power of sale for foreclosure and foreclosure by court proceedings. Part III provides two short forms for mortgages, one of which is for trust mortgages; and Part IV of the act gives a few concise rules for its interpretation.

The introductory sections of the act are devoted to definitions, none of which seem open to criticism. For instance the one covering "file for record" or "record" is very similar to the present provision of the Kentucky Statute, and means "file for record in the recording office of each county where the land or any part thereof is located; but failure to so file for record in any county shall affect only the land located in that county."

In section two it is stipulated that a mortgage gives a lien on the real property and does not create an estate therein. This is in keeping with the present view of mortgages in Kentucky as well as in a majority of the states. Although there is no provision in the statutes nor in the code, which expressly states that a mortgage creates a lien and not an estate, the court in construing the provisions of the code has held that a mortgage is a lien and not an estate.

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1 Section 496.
This section of the proposed act also provides that the mortgagee has no right to possession or to rent and profits until foreclosure and the redemption period has expired even though the mortgage itself contains an agreement to the contrary. This provision seems consistent with the construction put upon the sections of the Civil Code to the effect that "the legal title to the mortgaged premises, both at law and in equity, remains in the mortgagor during the life of the mortgage." The decisions, however, do not seem to go so far as to prevent the parties co-venanting for possession by the mortgagee. The act does allow a mortgagee who has entered under a defective foreclosure proceeding and with the mortgagor's consent, to retain possession until the obligation of the mortgage has been complied with.

The provision in the third section of the act for the appointment of a receiver on commencement of a foreclosure proceeding or when the premises are in danger of being materially injured, is very similar to section 299 of the Kentucky Civil Code. The code reads: "In an action by a mortgagee for the sale of the mortgaged property, a receiver may be appointed, if it appear that the property is in danger of being lost, removed or materially injured or that the condition of the mortgage has not been performed, and that the property is probably insufficient to discharge the mortgage debt." It has been held that the appointment of a receiver, in such a case, is a matter of sound legal discretion and it was further held in Wilson v. A. & T. Co. that in a suit to enforce a mortgage lien the judge in vacation could not order a sale in advance of a decision on the merits and could only appoint a receiver to preserve the property.

Tender of the amount due on a mortgage, when made after maturity, if not accepted, does not discharge the lien. The rule in several states is that such a tender does discharge the lien but these states for the most part follow the "lien" theory as to mortgages. In Kentucky the point does not seem to have been litigated.

The section dealing with mortgages given to secure future advances in whole or in part, provides that such advances shall

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3 Mercantile Trust Co. v. So. Park Residence Co., 94 Ky. 27, 22 S. W. 314; Guill's Adm'rs v. Corinth Deposit Bank, 63 S. W. (Ky.) 871.
4 Douglas v. Uhne, 12 Bush, 608.
5 91 Ky. 299.
6 Jones on Mortgages, section 893.
have the same priority as if they were made at the time of giving the mortgage. If, however, the making of the advances is optional, this is not so as to other incumbrances of which the mortgagor has notice at the time a further advance is made. The provisions of this section seem in harmony with the common law as laid down by Jones in his work on Mortgages\(^7\) and seem to be supported in the main by Kentucky decisions.\(^8\)

Where a mortgage secures a negotiable instrument, it is free from any defences from which the note is free because of its negotiable character, subject, however, to the provisions of the recording acts. The committee here accepted the rule followed in most states, which was early adopted in this state.\(^9\)

If the mortgage secures several instruments, no priority is allowed between them in the absence of any agreement for such preference or priority. The holding of the Kentucky Court of Appeals would, it seems, accept this rule for in *Campbell v. Johnston*,\(^10\) where the mortgagor was allowed a set-off against the mortgage notes, which were in the hands of various assignees, and where the set-off was against one note, it was held that the proceeds of the foreclosure sale should be so distributed as to make all the assignees contribute ratably to the set-off.

It is further provided that personal representatives appointed in another state, upon filing a duly exemplified copy of his letters of appointment, be allowed to assign or foreclose a mortgage belonging to the estate represented by him. In this state a non-resident executor or administrator is allowed to prosecute actions for the recovery of debts due to his decedent, upon filing a bond, with surety, resident in the county in which the action is brought.\(^11\) Since a mortgage in Kentucky can be foreclosed only by bringing an action in court, the provision in the uniform act would seem to introduce little change in regard to non-resident representatives.

Where the principal of a mortgage has become due under an acceleration clause, provision is made whereby the mortgagor

\(^1\) Ibid, sections 368-370.
\(^4\) Dana, 177.
\(^5\) Ky. St., section 3878; Civil Code, section 616.
may pay or tender before sale on foreclosure the amount due with costs of the foreclosure and attorney’s fees and have the mortgage reinstated. Such right is not allowed by either the statutes or the code. It is difficult to see any real reason for objecting to the introduction of such a provision as it seems fair and does not cause the mortgagee any loss financially.

The interest acquired at the foreclosure sale is subject to attachment, the lien of judgments, levy and execution, as in the case of the real property. The adoption of such a provision would not work a change in the Kentucky law for under foreclosure by court procedure the mortgagor is not given a right of redemption unless the land does not bring at the sale two-thirds of its appraised value. Consequently in the normal case the purchaser becomes the owner at once and his interest in the land can be levied upon.

Section eleven of the act stipulates that the lien of a mortgage shall terminate absolutely at the end of fifteen years, if not renewed of record. It is a statute of limitations as to mortgages and no action or proceedings can be brought on the mortgage thereafter. States are free of course to fix a different period of time than fifteen years, if it seems that that period is not the best. An extension of time is provided for by agreement in writing duly recorded. This is for the protection of bona fide purchasers of the mortgaged property and also to provide a way of removing clouds on titles due to the failure to discharge mortgages on the records. At the present time it sometimes becomes necessary to institute suits in order to clear up a title. The proposed change should commend itself to every conveyancer.

The next section makes criminal the intentional injuring of the security either before foreclosure sale or after the sale. It is practically the same as the Kentucky Statute in regard to the impairment of personal property by the mortgagor.

It is when we come to Part II that we find the principal change that would be made in the Kentucky law of mortgages by the adoption of such legislation as was proposed by the special committee of the National Conference on Uniform State Laws. It deals with the question of foreclosure and provides for fore-

19 Ky. St., sections 2364, 2365.
20 Ky. Stat., section 1358.
closure by power of sale whereby no court proceedings are necessary. Foreclosure by court action is also allowed. The Civil Code now stipulates that foreclosure must be by an action in court.\textsuperscript{14}

The method of foreclosure worked out by the committee requires that notices be mailed to all interested parties as well as that publication of the notice of sale be had in a newspaper published in the county where the land is or if there be no such paper in the county then in one published in an adjoining county and that such publication be had for three consecutive weeks prior to the sale. The sale itself must be conducted by the sheriff of the county and his certificate of sale and the record thereof is made prima facie evidence of title in the purchaser and is conclusive evidence of a valid foreclosure in favor of bona fide purchasers and encumbrancers from the purchaser. The costs and attorney's fees for foreclosure are also fixed by the proposed act. A fee of $3.50 is allowed the sheriff for conducting the sale and making a certificate thereof. The attorney's fee is fixed according to the amount of the mortgage debt. A period for redemption by the mortgagor is allowed. One year from the date of sale is suggested by the drafters of the act. If the mortgagor does not redeem, a lienor is allowed the privilege of redeeming within ten days after the mortgagor's period of redemption expires. Forms to be used in foreclosure proceedings, such as notice, certificate of sale and certificate of redemption are set forth.

About half the states do not allow foreclosure by power of sale. It is about this point that the fight for the final adoption of a uniform real property mortgage act will probably be waged. The expense and delay involved in a court procedure add to the difficulty of securing a loan today when there are so many attractive openings for capital. The examples given by the committee in its second annual report to the conference\textsuperscript{15} most forcefully show the difference in costs and delay between foreclosure in court and foreclosure under a power of sale mortgage. The Chicago law firm of McCulloch, McCulloch and Dunbar were at the same time foreclosing mortgages in Illinois where court procedure is required and in Minnesota where foreclosure similar

\textsuperscript{14} Section 375.
\textsuperscript{15} Handbook of Committee, 1925, p. 11.
to that set forth in the draft for a uniform law, that is by advertisement, is allowed. The Illinois mortgage secured a debt of $27,000 and that of Minnesota $17,000. Both were on farm property. The cost in the former suit, which would be added to the amount the mortgagor would have to pay if he redeemed the property, was $3,000. In the Minnesota case the extra cost would be only $239.80. The time taken in the former case, which was uncontested, was twice as long as that taken under the second method. Thus a provision that was originally designed to protect the borrower, in the event that he failed to pay the loan has come to make it more difficult and expensive for him to secure a loan in the first place. The change urged by the committee would seem to be as much, if not more, in behalf of the borrower than the lender.

As already pointed out, Part III contains forms for mortgages, assignments, satisfaction and partial releases. A short form mortgage would result in a very great saving in recording fees alone. One attorney of the Metropolitan Life Insurance Company estimated that the saving to his company alone would be $40,000 a year.16

Perhaps the best summary of the advantages of the uniform real property mortgage act prepared by the special committee, was made by the editor of the Harvard Law Review in a note published in the March issue, 1925. He says:

"The proposed act not only makes for uniformity; it promotes brevity and certainty in mortgage instruments, simplicity of procedure, and validity of title. It enables the mortgagor to realize readily on his security; yet it protects the mortgagor against forfeiture. It relieves court congestion and shortens registry records. It has been carefully drawn and has for four years been subjected to thorough consideration and correction."17

It is the purpose of this article to show how the adoption of the uniform mortgage act, reported by the special committee, would affect the law of mortgages in the average state; for probably the changes wrought in any state would not be greater than those pointed out in the case of Kentucky. Furthermore, it is

16 Handbook of Committee, 1925, p. 9.
17 38 Harvard L. R. 660.
fair to say that the benefits to be gained should make it worthwhile to urge further action on the National Conference of Commissioners. Every lawyer is interested in making the law of mortgages conform to present day business methods and he should make a careful study of the proposed legislation.

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