

MISSOURI
REAL ESTATE
COMMISSION :

Restriction agreement filed after
deed of trust does not apply to
purchaser at trustee's sale.

July 16, 1942

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Missouri Real Estate Commission
Jefferson City, Missouri

Attention: Mr. J. W. Hobbs, Secretary.

Gentlemen:

We are in receipt of your request for an opinion,
under date of July 14, 1942, which reads as follows:

"We have a licensee in Kansas City
namely Kelly-Townsend Company who
are agents for the Home Owners Loan
Corporation and as agent had the list-
ing of 2411 Prospect, Kansas City,
Missouri. Said property is restricted
as to sale to negroes as shown in docu-
ment A 477865, Book B, 3039, Page 27,
signed, acknowledged and executed by
the property owners the 18th day of
December 1930, filed for recording
August 3, 1931.

"A negro buyer called at licensee
office and desires to buy this proper-
ty. The licensee asked the Home Owners
Loan Corporation if the property could
be sold to negroes. The Home Owners
Loan Corporation through its Regional
Counsel requested an opinion and Mr.
W. M. McAdams, Vice President of the
Missouri Abstract and Title Insurance
Company, Kansas City, Missouri advised
them as follows:

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"We have your letter of July 6th regarding our certificate on the property involved in the captioned case, and desire to advise that a restriction agreement was filed August 3, 1931, and recorded in Book B-3039 at Page 27, restricting the use of the premises in question and other property in the surrounding neighborhood against use by negroes for a period of fifteen years from and after January 1, 1931, with provision for automatic extension for successive periods of fifteen years thereafter unless released in the manner therein provided, but this restriction was cut out by the foreclosure of a prior deed of trust at trustee's foreclosure sale held on September 14, 1931, and was not recognized by the purchaser at said sale nor any subsequent grantee by any evidence of record, and we, therefore, take the position that our certificate regarding this matter is correct and that there are no restrictions involving the premises in question which you are required to recognize."

In the letter of Mr. W. M. McAdams, which you quote in your request, it is stated that the restriction agreement was filed August 3, 1931, and recorded in Book B-3039, at page 27. Also, that this agreement was to be in effect for a period of fifteen years from January 1, 1931, with provisions for automatic extensions. He also states that the purchaser at the trustee's foreclosure sale, which was held on September 14, 1931, did not, in any manner recognize or agree to the restriction agreement. Since the agreement was filed August 3, 1931, and the deed of trust was foreclosed

on September 14, 1931, for the purpose of this opinion we are assuming that the deed of trust was given on the property before the date of the restriction agreement, or the date of the filing of the restriction agreement, and that the deed of trust did not contain any of the restrictions set out in the restriction agreement.

Section 3426 R. S. Missouri, 1939, reads as follows:

"Every instrument in writing that conveys any real estate, or whereby any real estate may be affected, in law or equity, proved or acknowledged and certified in the manner hereinbefore prescribed, shall be recorded in the office of the recorder of the county in which such real estate is situated."

It will be noticed that in the above section it is specifically stated: " * * * whereby any real estate may be affected, * * * ." By the filing of the deed of trust it was notice to any subsequent actions affecting the real estate, that the property was subject to the amount of the loan described in the deed of trust, and also subject to foreclosure if the loan was not paid at a certain time.

Section 3427 R. S. Missouri, 1939, reads as follows:

"Every such instrument in writing, certified and recorded in the manner hereinbefore prescribed, shall, from the time of filing the same with the recorder for record, impart notice to all persons of the contents thereof and all subsequent purchasers and mortgagees shall be deemed, in law and equity, to purchase with notice."

It has been held in this State that the mortgagor may perform certain things incidental to the property, even though it is subject to a mortgage or deed of trust, but the mortgagor cannot perform something that would be a detriment to the mortgage of record. There is no question but that a first mortgage cannot be affected by the giving of a second mortgage.

Under the facts in your request the restriction agreement was not entered into until after the deed of trust had been given. That the rights of the mortgagee were paramount to the rights of the mortgagor, under the facts set out in your request, is upheld in the case of *Eurengy et al. v. Equitable Realty Corporation*, 107 S. W. (2d) 68, l. c. 71, where the court said:

"In this State a mortgage or deed of trust conveys no estate in the land, but merely creates and evidences a lien thereon to secure the debt. Until the mortgagor defaults and the mortgagee forecloses or takes possession the mortgagor continues as the owner of the estate and has a right to lease, sell, and in every respect deal with the mortgaged premises as owner. *Kennett v. Plummer*, 28 Mo. 142; *City of Springfield ex rel. Southern Missouri Trust Co. v. Ransdell*, 305 Mo. 43, 264 S. W. 771; *Hunter v. Henry* (Mo. App.) 181 S. W. 597. Or, to otherwise express the rule, a mortgage or deed of trust on real estate is merely a security for the debt. As long as the mortgagor is in possession, he may sell or may lease the premises and collect the rents and proceeds and is entitled to sue for and recover all damages resulting from the injuries inflicted upon or from any interference with his possession. As to all parties save and except

the mortgagee, these rights and remedies belong to the mortgagor to the same extent after as before the mortgage was executed. As to all the world except the mortgagee, the mortgagor continues the real owner. * * * * "

Also, in the case of Guaranty Savings & Loan Ass'n. et al. v. City of Springfield, 113 S. W. (2d) 147, Pars. 10, 11, where the court said:

"The mortgages of the respondent Guaranty Savings & Loan Association were duly recorded in the office of the recorder of deeds for Greene county, and therefore the appellant in making settlement with the Hivelys was charged with knowledge of their existence and contents, and the lien created upon the land in question. Sections 3039, 3040, R. S. Mo. 1929, Mo. St. Ann. secs. 3039, 3040, pp. 1879, 1880; Clay v. Walker, Mo. App., 6 S. W. 2d 961, 962.

"The authorities in this state and in other states conflict to some extent as to whether the mortgagee is an 'owner' and whether his interest in the real estate is 'property,' but this question is settled by the case of Morgan v. Willman, supra. The court in this case, 318 Mo. 151, loc. cit. 168, 1 S. W. 2d 193, 200, 58 A. L. R. 1518, said: 'After a careful and thoughtful analysis and study of the authorities bearing upon the question, we are constrained to

the view, and so hold, that the interest of plaintiff in the land in controversy, by reason of being the owner and holder of the note secured by the deed of trust upon such land, is "property," and that plaintiff is the "owner" of property, within the meaning and intent of section 21, art. 2, of the Constitution, and the applicable statutes of this state.'

"Whatever has been held by the courts of this state, regarding the status of a mortgagee relative to the land secured by his deed of trust, if in conflict with this case, is not binding on this court, as this is the latest and governing decision of the Supreme Court, and puts at rest all doubt regarding the status of the mortgagee. Section 21 of article 2 of the Constitution of Missouri provides that private property shall not be 'taken' or 'damaged' without just compensation to the owner thereof. The mortgagee therefore is an 'owner' within the contemplation of this constitutional provision and his interest in the land is 'property.' His rights are twofold-- if the property is taken in whole or in part he must be compensated, if it is damaged he must be compensated, and there is no distinction in so far as the mortgagee is concerned between the taking and damaging of his property. He has the right under article 2, sec. 21, of the Constitution to compensation in either event."

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If the deed of trust had been given after the filing of the restriction agreement, the agreement would not be affected by the foreclosure. However, since, according to your request, it was such a short time between the foreclosure and the filing of the restriction agreement, we are assuming that the deed of trust was given before the filing of the restriction agreement.

CONCLUSION

In view of the above authorities, it is the opinion of this department that the property at 2411 Prospect, Kansas City, Missouri, is not subject to the restriction agreement, as to the sale to negroes, as shown in document A 477865, Book B, 3039, page 27, in the office of the recorder of deeds of Jackson County, Missouri.

It is further the opinion of this department that if the deed of trust was given after the filing of the restriction agreement, the above described property would be subject to the restriction agreement, even though it had been foreclosed by a trustee's sale.

Respectfully submitted,

APPROVED:

W. J. BURKE
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VANE C. THURLO
Acting Attorney General

WJB:RW