MORTGAGE EXTENSIONS AND MODIFICATIONS

ROBERT KRATOVIL*  
RAYMOND J. WERNER**

These are troubled economic times. The word "recession" is passé. Now the term on the economists' lips is the much dreaded "depression," something that many of the younger members of our society thought they would only recognize as part of history and not something they would live through. Whatever may be in the future for the American economy, one thing is clear—today many mortgages are in default.

Extensions and modifications of mortgages are being sought. A federal court has held in Brown v. Lynn1 that the Department of Housing and Urban Development must recast defaulting FHA mortgages; this holding will result in thousands of extension agreements. It is hoped that this article will answer some of the questions that will inevitably arise.2

ORAL EXTENSION AGREEMENTS

At times the validity of an oral extension agreement has been raised. It has been said that where a mortgage is not under seal,3 the time for payment of a mortgage may be extended by oral agreement.4 This is a situation where the law gives the parties leeway which they ought not take advantage of. Certainly no sophisticated lender would engage in the practice of allowing such an agreement to be left to the vagaries of memory and uncertain proof. Moreover,

---

2. Much of this law has lain dormant for a good many years. This is evidenced by the fact that many of the cases considering the issues discussed herein were decided in the 1940's and earlier. Indeed the last major work in this area of the law, Meislin, Extension Agreements and the Rights of Junior Mortgagees, 42 VA. L. REV. 939 (1956) is almost 20 years old.
if the agreement is to be effective against other parties, many states require its recordation;\(^5\) hence a writing is needed. Subject to the exception relating to the oral extensions of time, it is generally held that the statute of frauds requires a writing if the extension is to include an increase in the debt, or an increase in the interest rate.\(^6\) The thought is that the extension would be the equivalent of the execution of a new mortgage to cover an existing debt.\(^7\)

**THE REQUIREMENT OF CONSIDERATION**

While it has been said that mutual promises to extend are sufficient consideration for each other,\(^8\) the older rule is that an agreement for the extension of time of repayment must be supported by a new consideration if the parties are to be bound.\(^9\) Today, this rule is not universally accepted.\(^10\)

The question of whether consideration is required to support the extension agreement is really a function of contract law and not mortgage law.\(^11\) Consider the problem in its simplest form. The mortgagor and mortgagee have an existing obligation. Their rights and duties are already defined by the terms of their contract. The mortgagor is obligated to make various payments in a prescribed fashion and on a prescribed schedule. He is also obligated to keep the property insured, in a state of repair, and to pay real estate taxes as they become due. When the mortgagor agrees to pay at a later date, he is agreeing to do nothing more than that which he has already agreed to do. In fact he obtains a concession. The mortgagee in a transaction that involves the mere extension of time is not benefited under traditional legalistic notions. Under

---

5. See text and notes 120-122 infra.
the ritualistic form of contract law, there would be no benefit to the promisor or detriment to the promisee for consideration to be found.\textsuperscript{12} This concept has been called the pre-existing duty rule.\textsuperscript{13} The rule states that a promise to do what is already an obligation under a pre-existing contract does not result in a legal detriment so as to support a promise on the part of the other party to the contract.\textsuperscript{14} Because the courts have not explained their decisions in these terms, it cannot be categorically stated that this rule has been the underlying philosophy behind the courts' holdings.\textsuperscript{15} It does seem, however, that this rule must have been in the collective minds of the courts when deciding that an extension agreement was invalid for failure of consideration.

The validity of the underlying rationale for this older rule is open to question. Modern contract law permits contracting parties to modify their agreements. Expressly rejected is the notion that consideration must be found solely on benefit to the promisee or detriment to the promisor.\textsuperscript{16} The parties are free to modify their

\begin{itemize}
\item \textsuperscript{12} A. Corbin, \textit{Contracts} § 121, at 517 (1963).
\item \textsuperscript{13} J. Calamari & J. Perillo, \textit{The Law of Contracts} § 61, at 120 (1970).
\item \textsuperscript{14} In an extension agreement setting, it was said in Portland Mortgage Co. v. Horenstein, 162 Ore. 243, —, 91 P.2d 533, 534 (1939):
\begin{quote}
It will be seen from what has been stated above that the mortgagors were not required under the extension agreement to perform any other or different obligations than they were required to perform under the terms of their mortgage. At the time this agreement was entered into, the entire mortgage debt was then due and owing by the mortgagors to the plaintiff and, under the terms of this agreement, the mortgagors merely promised to pay a portion when they were already obligated to pay the whole. There was, therefore, no sufficient consideration to support the promise of the plaintiff.
\end{quote}
\item \textsuperscript{15} See, e.g., Haase v. Blank, 177 Wisc. 17, 187 N.W. 669 (1922). But see Portland Mortgage Co. v. Horenstein, 162 Ore. 243, 91 P.2d 533 (1939) where the court, quoting S. Williston, \textit{Contracts} § 120 (Rev. ed. 1968) said:
\begin{quote}
Since a debtor incurs no legal detriment by paying part or all of what he owes, and a creditor obtains no legal benefit in receiving it, such a payment if made at the place where the debt is due in the medium of payment which was due, and at or after maturity of the debt, is not sufficient consideration for any promise.
\end{quote}
\item \textsuperscript{16} \textit{Restatement (Second) of Contracts} § 81 (Tent. Draft Nos. 1-7, 1973) provides:
\begin{quote}
If the requirement of consideration is met, there is no additional requirement of (a) a gain, advantage, or benefit to the promisor or a loss, disadvantage, or detriment to the promisee; or (b) equivalence in the values exchanged; or (c) "mutuality of obligation."
\end{quote}
The Restatement substitutes the following definition of consideration:
\begin{quote}
(1) To constitute consideration, a performance or a return promise must be bargained for.
\end{quote}
duties under executory contracts. This was the approach taken by the drafters of the Uniform Commercial Code [U.C.C.] when they provided that “[a]n agreement modifying a contract within this Article needs no consideration to be binding.” Some jurisdictions have abandoned the pre-existing duty rule in mortgage modification situations.

(2) A performance or return promise is bargained for if it is sought by the promisor in exchange for his promise and is given by the promisee in exchange for that promise.

(3) The performance may consist of
   (a) an act other than a promise, or
   (b) a forbearance, or
   (c) the creation, modification, or destruction of a legal relation.

(4) The performance or return promise may be given to the promisor or to some other person. It may be given by the promisee or by some other person.


17. Restatement (Second) of Contracts § 89D (Tent. Draft No. 2, 1965) states:
   A promise modifying a duty under a contract not fully performed on either side is binding:
   (a) if the modification is fair and equitable in view of circumstances not anticipated when the contract was made; or
   (b) to the extent provided by statute; or
   (c) to the extent that justice requires enforcement in view of material change of position in reliance on the promise.


This is a recognition of the jurisprudential notion that statutes should be treated the same as judicial precedents “as both a declaration and a source of law, and as a premise for legal reasoning.” Stone, The Common Law in the United States, 50 Harv. L. Rev. 4, 13 (1936). A recent statute may be a better guide for decision than a musty precedent.

19. See, e.g., N.Y. Gen. Obl. Laws § 5–1103 (McKinney 1964), which provides:
   An agreement, promise or undertaking to change or modify, or to discharge in whole or in part, any contract, obligation, or lease, or any mortgage or other security interest in personal or real property, shall not be invalid because of the absence of consideration, provided that the agreement, promise or undertaking changing, modifying, or discharging such contract, obligation, lease, mortgage or security interest, shall be in writing and signed by the party against
The adoption in the Restatement of the U.C.C. philosophy will at least theoretically please those who say that doing away with the requirement of consideration may give rise to duress. 20 This is so because the U.C.C. imposes the test of good faith 21 and the Restatement, in doing away with the requirement of consideration where there is a modification of an existing contract, requires that the modification be "fair and equitable." 22

This approach is more sound than one engaging in tortured reasoning 23 or searching for slight, sometimes almost invisible, consideration. 24 Unfortunately, courts continue to give vitality to the old theories. A recently reported case from the Supreme Court of Connecticut 25 applied rigid traditional contract law in spite of the existence of more enlightened thinking.

Whether the traditional or modern theory is used, an advance payment on the principal of the mortgage or the payment of interest in advance is sufficient consideration to support the extension agreement. 26 Further, it is said that a written extension agreement is presumed to be supported by consideration. 27 Where the mortgagor transfers his interest, forbearance of the mortgagee from bringing suit and the granting of an extension of time for repayment is sufficient consideration for the promise of the grantee to assume the mortgage. 28

whom it is sought to enforce the change, modification or discharge, or by his agent.
24. The court in First Wis. Nat'l Bank of Milwaukee v. Oby, 52 Wis. 2d 1, _ , 188 N.W.2d 454, 456-47 (1971), quotes Williston: Both benefit and detriment have a technical meaning. Neither the benefit to the promisor nor the detriment to the promisee need be actual. "It would be a detriment to the promisee, in a legal sense, if he, at the request of the promisor and upon the strength of that promise, had performed any act which occasioned him the slightest trouble or inconvenience, and which he was not obliged to perform."

See also Note, 80 U. Pa. L. Rev. 1161 (1932); 55 Am. Jur. 2d Mortgages § 1122, at 937 (1971).
26. 1 C. Wiltse, A Treatise on the Law and Practice of Real Property Mortgage Foreclosure § 171, at 293 (4th ed. 1939) lists many examples of consideration which will support a promise for the extension of the time of payment.
In those instances where the court persists in adhering to the traditional notions of consideration, there is yet another argument which may aid the mortgagor. An estoppel may be worked if the mortgagee misled the mortgagor by representations to the effect that the time for repayment has been extended.\textsuperscript{29} Difficulties arise with the use of this theory, however, because the cases are not in accord and will turn on their own peculiar facts.

Note should also be made of another formal requirement. If a mortgage is federally related it cannot be extended unless there has been compliance with the Federal Flood Disaster Protection Act.\textsuperscript{30}

**SUBSTITUTION OF MORTGAGES**

At times a new mortgage is substituted for the old mortgage as a means of evidencing an extension of time of payment, hence some discussion of the law of substitution is appropriate. As a general rule,

[W]here the holder of a senior mortgage discharges it of record, and contemporaneously therewith takes a new mortgage, he will not, in the absence of paramount equities, be held to have subordinated his security to an intervening lien unless the circumstances of the transaction indicate this to have been his intention . . . .\textsuperscript{31}

The application of this rule is not impaired even where the original mortgage is cancelled,\textsuperscript{32} released,\textsuperscript{33} marked “paid”\textsuperscript{34} or satisfied of record.\textsuperscript{35} In reality, what occurs is nothing more than a substi-
tution of security instruments.\textsuperscript{36} It will be shown that such substitutions are ill-advised, to say the least.

This substitution of the new mortgage for the old and the cancellation of the old does not, without more, work a subordination to the rights of any intervening lienholders.\textsuperscript{37} If a subordination is to occur, it does so because of the intent of the parties—particularly the mortgagee—that a reduction of priority take place.\textsuperscript{38} Indeed some courts have gone so far as to say that unless a contrary intention appears, the substitution of the mortgage will not disturb the priority of the lien.\textsuperscript{39} A presumption has arisen to the effect that the mortgagee must have intended to keep his mortgage lien alive where it is essential to his security against an intervening title.\textsuperscript{40} While the intention of the parties test is by far the most

\begin{itemize}
  \item 281, 283 (1881); Hadley v. Schow, 146 Neb. 163, 169, 18 N.W.2d 923, 926 (1945). In \textit{Hadley} the court quoted 27 Cyc. 1222:
  \begin{quote}
  Entering satisfaction of a mortgage and taking a new one, when designed by the parties to be merely a continuation of the first mortgage, and when the two acts are practically simultaneous or parts of the same transaction, is not an extinguishment of the mortgage, but a renewal thereof, and does not give priority to an intervening judgment or mortgage creditor of the mortgagor, especially where it is done in good faith, in ignorance of the existence of the intervening lien, and without any intention to release the lien of the mortgage.
  \end{quote}

  \item 38. In Larson Cement Stone Co. v. Redlim Realty Co., 179 Neb. 134, 137, 137 N.W.2d 241, 244 (1965), the court reiterated its position when it quoted Hadley v. Schow, 146 Neb. 163, 170, 18 N.W.2d 923, 926 (1945):
  \begin{quote}
  \[H\]e [the holder of the senior mortgage] will not, in the absence of paramount equities, be held to have subordinated his security to an intervening lien unless the circumstances of the transaction indicate this to have been his intention, or such intention upon his part is shown by extrinsic evidence.
  \end{quote}

  \item 41. Hadley v. Schow, 146 Neb. 163, 170, 18 N.W.2d 923, 926 (1945). See also Barnouw v. The S.S. Ozark, 304 F.2d 717, 723 (5th Cir. 1962), cert. de-
realistic, it also presents obvious difficulties. Intention is not easily proved; it is often defined in nebulous and mainly subjective terms giving the courts some leeway in finding or not finding "intent" to achieve a certain result.\footnote{Presumptions are a help, but are not as certain as a straight-forward statement contained in the mortgage documents to the effect that the parties intend that the substitution of the new mortgage for the old will not disturb the existing priorities and the parties to the agreement intend that the new mortgage will have and retain the same priority as the old.\footnote{Where the fact of substitution does not appear of record, there is a danger, especially where the extension agreement is entered into by a subsequent owner rather than the mortgagor, that a bona fide assignee of a junior mortgagee would acquire priority over the substituted mortgage. Substitution might well be deemed to create a latent equity.\footnote{It is unfortunate that some courts have stressed the point that the mortgagee was unaware of the existence of intervening liens when he released his mortgage and accepted a substitute.}}}

Presumptions are a help, but are not as certain as a straight-forward statement contained in the mortgage documents to the effect that the parties intend that the substitution of the new mortgage for the old will not disturb the existing priorities and the parties to the agreement intend that the new mortgage will have and retain the same priority as the old.\footnote{Where the fact of substitution does not appear of record, there is a danger, especially where the extension agreement is entered into by a subsequent owner rather than the mortgagor, that a bona fide assignee of a junior mortgagee would acquire priority over the substituted mortgage. Substitution might well be deemed to create a latent equity.}\footnote{It is unfortunate that some courts have stressed the point that the mortgagee was unaware of the existence of intervening liens when he released his mortgage and accepted a substitute.}

The knowledge of the existence of junior lienors is really irrelevant. Some courts talk in terms of a "restoration" of priority statutes.\footnote{This is a poor choice of words. If priority is "restored," it must have been lost. But loss of priority is not consistent with the intent of the parties when the transaction was entered into. They intended that their priority would continue.}

Whether or not they knew of the existence of intervening lienors, United States v. Grover, 227 F. 181, 183 (N.D. Cal. 1915).


43. Thus, the philosophy underlying the latent equities rule is that the assignee of the mortgage can legitimately be required to make inquiry of the mortgagor as to any defenses he might have to foreclosure, but to extend the duty of inquiry further would be impractical. Silverman v. Bullock, 98 Ill. 11, 20 (1881). Latent equities are defined as "those rights and claims which are undisclosed at the time of the assignment and which reside in some prior assignor or in a third party who is a stranger to the assignment." 20 U. Chi. L. Rev. 692, 693 (1954). See generally 4 A. Corbin, Contracts § 900 (1951).

44. See, e.g., Union Loan & Savings Ass'n v. Simmons, 131 Neb. 260, 267 N.W. 449, 450 (1936). Tiffany indicates that this requirement is not universal. 5 H. Tiffany, The Law of Real Property § 1488, at 528 (3d ed. 1939).

holders, their intention would be unchanged. The more realistic approach is that priority is simply not lost by substitution unless that is the intent of the parties.\(^\text{46}\) The intention\(^\text{47}\) test would do justice among the parties and recognize the substance rather than the form of the transaction.\(^\text{48}\) Further, it would obviate any windfall or unjust enrichment inuring to the benefit of junior encumbrancers.\(^\text{49}\)

All of this does not mean that the first mortgagee will, in every instance, be able to retain priority over intervening lienors. The court will look to see whether prejudice befell the intervening lien claimants.\(^\text{50}\) Priority will not be afforded to a renewal mortgage if to do so would place innocent junior encumbrancers in a worse position.\(^\text{51}\) Such would be the case when the so-called junior mortgagee was misled by the record to the extent that he believed he was obtaining a first position.\(^\text{52}\) Injury will not be found, however, when the mortgagee is in the same position as he would have been had there been no substitution.\(^\text{53}\) Under the same theory, prejudice will not be worked on junior lienholders where a series of superior mortgages are released and a new consolidated mortgage is spread of record.

To recapitulate, substitution of mortgages is an imprudent step, ascribable only to ignorance of possible legal consequences.

\textbf{SUBSTITUTION OF NOTES}

The substitution of one note for the note originally secured by

\(^{46}\) United States v. Grover, 227 F. 181, 183 (N.D. Cal. 1915).

\(^{47}\) The idea of honoring the intention of the parties is not foreign to mortgage law. The question of whether a deed by the mortgagor to the mortgagee will operate as a merger of the mortgage lien into the fee is really a question of the intention of the parties. Annots., 149 A.L.R. 816, 817 (1944); 95 A.L.R. 628, 629 (1935).


\(^{51}\) Annots., 98 A.L.R. 843, 850 (1935); 33 A.L.R. 149, 162 (1924).

\(^{52}\) Washington County v. Slaughter, 54 Iowa 265, ---, 6 N.W. 291, 293 (1880).

\(^{53}\) Merchants & Marine Bank v. The T.E. Welles, 289 F.2d 188, 194 (5th Cir. 1961); Lomas & Nettleton Co. v. Isacs, 101 Conn. 614, ---, 127 A. 6, 8 (1924); Roberts v. Doan, 180 Ill. 187, ---, 54 N.E. 207, 209 (1899).
the mortgage will not discharge the original debt. Nor will the substitution of notes impair the priority of the mortgage. Perhaps this rule should be denominated "the rule to protect careless or ignorant bankers."

The problem here lies in the fact that when a debt underlying a mortgage is paid, the lien of the mortgage will be extinguished. An argument can be made that payment occurs when the original note is marked "paid by renewal" (as bankers often do) and a renewal note is executed. This argument must be rejected where the parties intend only a substitution of notes, as what really occurs is a mere change in the evidence of the debt and an extension of the time for repayment. The debt itself is not affected; it is not, in fact, paid. Thus, there is recognition that the mortgage does not secure the note, which is merely the evidence of the debt. The mortgage secures the debt rather than the original note and re-


57. R. Kratovil, Modern Mortgage Law and Practices § 136, at 89 (1972). But see Lurie v. Newhall, 333 Ill. App. 173, 76 N.E.2d 813 (1948), where the court said: The note bears on its face the bank stamp which recites that it was "paid by renewal." This banking phrase and practice has an established meaning recognized in judicial decisions. In Continental Illinois Nat'l Bank & Trust Co. of Chicago v. Cardwell, 287 Ill. App. 227, at page 245, 4 M.E.2d 770, at page 778, the court stated: "We are justified in taking judicial notice of the fact that it is the practice of banks when they take a renewal note to mark the surrendered note paid. The general rule is that where a note is given merely in renewal of another note and not in payment, the renewal does not extinguish the original debt nor change the debt except that it postpones the time for payment."

333 Ill. App. at —, 76 N.E.2d at 815.


60. Rice v. Federal Life Ins. Co., 172 Okla. 358, —, 45 P.2d 49, 51 (1935). This concept is part of the old fiber of mortgage law. In 19 Ruling Case Law 234 (1917), it is said: A mortgage secures a debt or obligation, and not the evidence of it, and no change in the form of the evidence, or in the mode or time of payment, can operate to discharge the mortgage.
mains effective as a lien until the underlying debt is satisfied or released. It is not affected by a substitution of notes.

Instead of marking the original note "paid by renewal," as some bankers do, it is suggested that a legend be placed on the original promissory note as follows:

The mortgage debt hitherto evidenced by this promissory note is now evidenced by a renewal promissory note dated in the sum of evidencing the unpaid balance of principal and accrued interest now due upon said note. The mortgage securing this note now secures said renewal note with all the priorities enjoyed by said mortgage at its inception.

However, it is still the better practice to record an extension agreement, in which case the legend on the note can read as follows:

The time of payment of the unpaid balance of principal and accrued interest due upon the mortgage debt evidenced by this note has been extended pursuant to extension agreement of even date herewith.

Where no receipt is given and no release is executed at the time the new note is given, the presumption is that the later note was not intended to discharge and pay the earlier note. If, however, a release of the mortgage is given, a contrary rebuttable presumption arises. The retention of the original note indicates the intent of the parties not to effect a release. It should not be considered, however, that the surrender of the old note tends to show an intent that the new note should extinguish the debt. Often the new note will not, in all respects, conform to the old. This variance will not, of itself, result in a destruction of the presumption in favor of the continued existence of the debt.

61. 2 L. Jones, A TREATISE ON THE LAW OF MORTGAGES § 1182, at 204-05 (8th ed. 1928).
64. Id. at 404, 30 So. at 734-35.
67. John Wanamaker New York, Inc. v. Comfort, 53 F.2d 751, 753 (5th Cir. 1931), cert. denied, 285 U.S. 560 (1932). See also 5 H. TIFFANY, THE LAW OF REAL PROPERTY § 1487, at 523-24 (3d ed. 1939). Tiffany lists some of these variations to include the addition of indorsers or sureties, changing the note to a demand note or judgment note, making the note payable at a different rate or place, the maker of the new note being the purchaser.
While these presumptions may be useful, the result should not be left to chance. The draftsman should insert a statement of intent in the extension agreement. Also, the substitution of a new note with a later maturity date than that of the original note is really another form of extension agreement. For that reason and to document the intention of the parties, an extension agreement should be entered into and recorded.

**AGREEMENTS EXTENDING THE TIME FOR PAYMENT OF A MORTGAGE—MERE EXTENSION OF TIME**

For various reasons, not the least of which is the fact that he has fallen upon hard times, a debtor may request an extension of the maturity of his existing mortgage loan. In this way, the debtor may reduce the demands made upon his current cash flow. The parties will find comfort in the fact that the validity of the mortgage will not be affected by the agreement which they enter into extending the time of repayment. Unless otherwise modified, all of the rights and remedies which the parties had under the mortgage will continue under the mortgage as extended. It has been said that the extension agreement has the “same force and effect as if the terms of the modification agreement were originally incorporated in the mortgage.” And, if a foreclosure action were from original maker, or the payee of the new note being an assignee of the original creditor.


Forms to be used in connection with the extension of time for payment of the principal indebtedness may be found at Modern Legal Forms (1972). See § 5876 (also increases the rate of interest), § 5877 (also increases the rate of interest), §§ 5878, 5879, 5880 (to be used when the extension runs to a purchaser of the property), § 5882 (Illinois form to be used when the extension runs to the purchaser), § 5884 (Massachusetts form extending time of payment and increasing the rate of interest), §§ 5885 and 5886 (Minnesota form extending the time of payment), § 5889 (Tennessee form) and § 5740 (New York F.H.A. extension form), § 5881 (contains an example of a consent by a junior lienor to the extension of the time of payment of the first mortgage). See also 6 C. Nichols, Cyclopedia of Legal Forms, §§ 6.1156-6.1158, at 986-1003 (1959); 13 AM. Jur. Legal Forms 2d, §§ 179: 447 (Trust deed extension agreement); 179:451 (Massachusetts); 179:452 (Ohio); 179:453 (Texas). A sample form for the extension of time for a defaulted mortgage can be found in 6 C. Nichols, Cyclopedia of Legal Forms § 6.1159, at 1003 (1959).


71. 100 Eighth Ave. Corp. v. Morgenstern, 3 Misc. 2d 410, ___, 150 N.Y.S.2d 471, 475 (Sup. Ct. 1956). See also 2 L. JONES, A TREATISE ON THE
brought under the original mortgage with its stated maturity, the extension agreement would be an effective defense to that action.\textsuperscript{72}

The extension agreement continues the lien of the original mortgage.\textsuperscript{73} The mere extension of the time of payment will not impair the priority of the extended mortgage.\textsuperscript{74} The benefit of this doctrine is watered down somewhat if the so-called extension agreement is made a vehicle for more than the mere extension of the time for payment. It may provide, for example, for an increase in the interest rate or additional principal indebtedness. The addition of these items in the extension agreement will result in some loss of priority.\textsuperscript{75}

Where a loss of priority results from an extension or modification, such loss of priority should be limited to the extent of the harm resulting to junior lienors. This is akin to the doctrine found in the law of marshalling of assets.\textsuperscript{76}

While it is said that a mere extension agreement does not work

\textsuperscript{72} See also 2 L. Jones, A Treatise on the Laws of Mortgages \& Foreclosures in Illinois \$ 309, at 365 (1932); 1 C. Wiltzie, A Treatise on the Law and Practice of Real Property Mortgage Foreclosures \$ 169, at 288 (5th ed. 1939).

\textsuperscript{73} Higman v. Humes, 127 Ala. 404, __, 30 So. 733, 734 (1900). See also R. Kratovil, Modern Mortgage Law and Practice \$ 153, at 88 (1972); 59 C.J.S. Mortgages \$ 461 (2), at 730 (1949).


\textsuperscript{75} The loss of priority is only to the extent of the additional burdens placed on the mortgagor. Otherwise the position of the inferior lienor remains the same. See Barbano v. Central-Hudson Steamboat Co., 47 F.2d 180, 182 (2d Cir. 1931); Gardner v. Emerson, 40 Ill. 296, 300 (1866); Commonwealth Life Ins. Co. v. Louisville Ry. Co., 234 Ky. 802, __, 29 S.W.2d 552, 556 (1930); Kyle v. Bayou Sale Planting & Drainage Co., 134 La. 222, 63 So. 886 (1913); but see Empire Trust Co. v. Park-Lexington Corp., 243 App. Div. 315, 276 N.Y.S. 586 (1934), an aggravated fact situation.

\textsuperscript{76} R. Kratovil, Modern Mortgage Law and Practice \$ 233, at 155-56 (1972). See also authorities cited at note 75 supra.
a subordination of the first lien to liens of inferior priority, the parties are free to agree among themselves for the happening of an opposite result. Certainly in the typical situation, the first lienholder is not going to give up his priority. Instances do occur, however, where he may be compelled to change position due to economic realities. Because the court will be guided by its reading of the parties' intention in determining whether or not subordination takes place, drafting is important. If the parties desire a subordination to be worked, their agreement should so specify.

In drafting the second mortgage, the parties may include a provision to the effect that it is subordinate to the first mortgage "and any extensions and renewals thereof." Even without such a clause there is no need, in the ordinary situation, to obtain the consent of the junior lienor to the extension agreement. Many second mortgages require the mortgagor to make payments on the first mortgage or be in default on the second. The extension of the first mortgage may result in an amortization schedule which calls for smaller payments than those required by the original first mortgage. The making of these smaller payments does not constitute a default of the second mortgage. On the other hand, if the parties to the second mortgage structure their mortgage so as to expressly prohibit an extension or modification of the first mortgage, then a violation of this covenant would, of course, constitute a default under the second mortgage.

The blanket statement that a mere extension of time given to the mortgagor by the senior mortgagee will not affect the priority of that senior mortgage is open to some reservations. Courts are very watchful to be sure that the second mortgagee is not injured. If prejudice results to these subsequent lienholders, the agreement will be ineffectual at least in part as to them.

78. Farmers & Merchants State Bank v. Hildebrandt, 221 Wis. 394, ___, 267 N.W. 42, 43 (1936).
79. Id.
84. See Wheeler v. Menold, 81 Iowa 647, ___, 47 N.W. 871, 872 (1891); Diamond v. Tav Holding Corp., 131 Misc. 446, 226 N.Y.S. 129 (Sup. Ct. 1927).
MORTGAGE EXTENSIONS

occasionally finds application when the parties in executing the extension agreement attempt some impairment of the second mortgage.\(^85\) To restate the proposition, the mere extension of time granted to the mortgagee does not of itself injure junior lienholders.\(^86\)

The reason behind the holding may be found in the fact that all junior lenders are presumed to know that they take their interest subject to the rights of the superior lienholders, one of those rights being the ability to postpone payment.\(^87\) Indeed, need for an extension of time is so commonplace that it would be highly unusual for a junior lienor to be unaware of this need.

In fact, the granting of an extension to the mortgagor may really benefit the second mortgagee.\(^88\) If the extension were not granted, the mortgagor’s troubles might result in default and a foreclosure of the first mortgage. The fact that the first mortgage will not be repaid as rapidly as originally scheduled or that interest will be payable for a longer period than was originally anticipated does not necessarily mean that the holder of a junior lien suffers legal injury.\(^89\) Legal prejudice is likewise lacking if the property diminishes in value or the mortgagor becomes insolvent during the extension period.\(^90\)

EXTENSION AGREEMENTS—INCREASE IN THE INTEREST RATE AND ADDITIONAL INDEBTEDNESS

Occasionally a mortgage, as originally recorded, provides for increases in the interest rate upon the happening of certain events or the fluctuations of economic indicators.\(^91\) Certainly subsequent lienors cannot complain that the interest rate was increased to their

---


\(^{86}\) Commonwealth Life Ins. Co. v. Louisville Ry. Co., 234 Ky. 802, ___, 29 S.W.2d 552, 556 (1930); Hastings v. Wise, 91 Mont. 430, ___, 8 P.2d 636, 638 (1932); Hajek v. Pojar, 126 Neb. 386, 253 N.W. 354 (1934).


\(^{88}\) Hastings v. Wise, 91 Mont. 430, ___, 8 P.2d 636, 638 (1932).


\(^{90}\) 2 L. JONES, A TREATISE ON THE LAWS OF MORTGAGES OF REAL PROPERTY § 1202, at 676 (8th ed. 1928).

detriment. Also, the parties, as between themselves, can agree to an increase in the rate of interest.\textsuperscript{92} In fact, it is common for extension agreements to provide for an increase in the lender's rate of return.\textsuperscript{93}

But where the increase in the rate of interest is not automatic and lies in the discretion of the mortgage lender or is based upon an agreement between the parties entered into at the time the extension is given, priority over intervening lienors will not obtain as to such increase.\textsuperscript{94} For example, many mortgages contain a clause which provides that the lender may increase the interest rate on the giving of any extension. The mere fact that this provision is included in the original mortgage as recorded will not be sufficient to secure the priority for that increased interest over those who take their interest prior to the extension. The courts are watchful over the rights of intervening lien claimants to protect them against prejudice and, because the increase in the interest rate would result in such prejudice, priority for that additional amount is lost.\textsuperscript{95} Prejudice to the junior lienor comes from two sources. First, the increased interest rate places a greater burden upon the ability of the borrower to repay the junior creditor. And second, where the senior mortgage is silent on this score, the junior creditor takes his lien without notice of any prospective increase in the rate of interest on the first mortgage.\textsuperscript{96}

\textsuperscript{93} For a litany of the modifications which often go hand in hand with extensions of time, see Meislin, \textit{Extension Agreements and the Rights of Junior Mortgagees}, 42 VA. L. REV. 939, 941-42.
\textsuperscript{94} Mergener v. Fuhr, 189 Wis. 571, ___ 208 N.W. 267, 271 (1926); Remodeling & Constr. Corp. v. Melker, 65 N.Y.S.2d 738 (Sup. Ct. 1946). In Prudential Ins. Co. v. Nuernberger, 135 Neb. 743, 753, 284 N.W. 266, 271 (1939), the court quoted from Barbano v. Central-Hudson Steamboat Co., 47 F.2d 160, 162 (2d Cir. 1931), saying:

It may be conceded that an agreement for the payment of a higher rate of interest during extension is invalid as against a junior lienor insofar as it impairs the latter's security . . . . It is a very different thing to assert that such an agreement enhances the rights of a junior lienor.

\textit{See also} 8 G. THOMPSON, \textit{COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY} § 4319, at 404 (1963); 1 L. JONES, \textit{A TREATISE ON THE LAW OF MORTGAGES OF REAL PROPERTY} § 654, at 939 (8th ed. 1928). Forms which may be useful in drafting provisions for an increase in the interest rate may be found in \textit{MODERN LEGAL FORMS} (1972). See § 5876 (also extends time of payment), § 5877 (also extends time of payment), and § 5884 (Massachusetts form which also extends time of payment).

\textsuperscript{95} 1 L. JONES, \textit{A TREATISE ON THE LAW OF MORTGAGES OF REAL PROPERTY} § 654, at 940 (8th ed. 1928); 8 G. THOMPSON, \textit{COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY} § 4319, at 405 (1963).
\textsuperscript{96} 1 L. JONES, \textit{A TREATISE ON THE LAW OF MORTGAGES OF REAL PROP-
As an analogy to the case of increases in the interest rate, mortgages often provide that in addition to the principal stated, the mortgage covers future advances that the mortgagee might choose to make to the mortgagor. This is the commonplace "open-end" mortgage used extensively by savings and loan associations. Optional future advances, such as those under an open-end mortgage, face serious loss of priority problems. Since few non-construction mortgages bind the lender to advance additional funds at the time of an extension, such an advance is obviously optional.

Of course, without such a provision, the security of the mortgage could not be extended to cover additional debt. It will, however, be extended to cover expenditures for the payment of delinquent taxes or the making of necessary repairs, or the completion of a building if the mortgagor defaults in these respects. This is under the doctrine of economic compulsion.

The problem that is most pressing, however, is whether priorities are disturbed by the inclusion of additional debt in the extension agreement. The authorities are in accord that an extension agreement which increases the amount of indebtedness is ineffectual as against subsequent encumbrances when the mortgage, as originally recorded, did not provide for such advances.

---


100. The statute of frauds requires that such agreement be in writing. Healy v. Fidelity Sav. Bank, 238 Wis. 12, _, 296 N.W. 170, 170-71 (1941). See also 59 C.J.S. Mortgages § 178, at 223 (1949); Annot., 76 A.L.R. 574, 579-88 (1932).


104. Bank of Searcy v. Kroh, 195 Ark. 785, _, 114 S.W.2d 28, 28 (1938); Jones v. Sturgis, 118 Colo. 579, _, 199 P.2d 645, 647 (1948); Balch v. Chaffee, 73 Conn. 318, _, 47 A. 327, 327-28 (1900); Gardner v. Emerson, 40 Ill. 296, 300 (1866); Guleserian v. Fields, 351 Mass. 238, _, 218 N.E.2d 397, 401 (1966); Heller v. Gate City Bldg. & Loan Ass'n, 75 N.M. 596, 408 P.2d 753 (1965); Werner v. Automobile Finance Co., 337 Pa. 433, 12 A.2d 31, 32
The rationale of the rule is that the holder of the inferior lien assumed his position with no notice of the possibility of the creation of such additional indebtedness. The record is notice only to the extent of the debt stated. The subsequent lienor can safely rely upon that record for purposes of determining his priority. The parties are in no way prevented from modifying the terms of the original mortgage to provide for additional debt, but they should be mindful that the priority for the additional sum will relate in time to the recordation of the modification agreement. Stated otherwise, the giving of the extension to increased indebtedness does not destroy the earlier established priority of the mortgage, but it will not be effective to give the prior lienholder priority for the additional debt.

The result in both the increase in the interest rate and principal indebtedness situations may also be explained by analogy to the obligatory-optional future advance situations. The rule is stated:

When the mortgagor is "obligated" to make future disbursements, the decisions in the priority states agree that the mortgage lien will be superior to that of a subsequent encumbrance even though the mortgagor makes the payout after the lien of the subsequent encumbrance has attached to the mortgaged land. As stated by some authorities, in the priority states the future advance relates back to the recording of the mortgage. The rationale for this doctrine is that the obligation of the mortgagor is fixed at the time the mortgage is executed and the fact that the money does not change hands until some later date is irrelevant.

A problem is created for construction lenders where the future disbursements are deemed optional. In most states, the lien for the future advance will not be superior to intervening liens if the advance is made with actual or, in a minority of states, constructive knowledge of a subsequent encumbrance. (Citations omitted.)

Indeed, some courts have relied upon the obligatory-optional doctrine in reaching the conclusion that priority will not be extended

(1940); 1 L. Jones, A TREATISE ON THE LAW OF MORTGAGES OF REAL PROPERTY § 440, at 563 (8th ed. 1928). See also Annot., 76 A.L.R. 574, 586-90 (1932).
105. Bank of Searcy v. Kroh, 195 Ark. 785, —, 114 S.W.2d 26, 28 (1938); Balch v. Chaffee, 73 Conn. 318, —, 47 A. 327, 328 (1900); Conly v. Industrial Trust Co., 27 Del. Ch. 28, 29 A.2d 601, 602 (1943). See also Annot., 76 A.L.R. 574, 589-90 (1932).
106. 1 L. Jones, A TREATISE ON THE LAW OF MORTGAGES OF REAL PROPERTY § 652, at 938 (8th ed. 1928).
107. Id. § 440, at 563 (8th ed. 1928).
MORTGAGE EXTENSIONS

1975] 613

to the additional debt provided in the extension and modification agreement. There is no reason why the obligatory-optional reasoning could not be used by a court to invalidate the priority for any increase in the interest rate which the mortgage allows but does not obligate the lender to make.

In approximately half the states a construction mortgage recorded prior to the visible commencement of construction enjoys priority over mechanics' liens.110 In some states, events occurring subsequent to the recording of the mortgage may result in a loss of this priority.111 Where the mortgage otherwise retains its statutory priority, a partial loss of priority may result if an extension of time is accompanied by an increase of principal or interest. In other words, the situation of the mechanics' lien claimant is no different than that of any other junior lienor. An extension agreement will have the same effect upon a junior mechanics' lien claimant as upon a junior mortgagee.

EXTENSION PLUS ADDITIONAL MODIFICATIONS

It is possible that no prejudice would be worked by a provision of the extension agreement that requires the payment of real estate taxes and insurance into an escrow account. Nor would prejudice occur if the mortgagor is required to carry life insurance. A similar result should follow if the notice provisions of the original mortgage are changed or the mortgagor is prohibited from altering the building without the mortgagee's consent. On the other hand, prejudice will probably be found when the extension agreement creates a lien on chattels where the second mortgagee previously acquired such a lien. Thus, if a chattel lien is desired, a chattel lien search should be made. Injury might be found if the extension agreement adds a stricter "events of default" clause or provides for the cancellation of a prepayment privilege. There is little or no case law on these aspects of extensions, and one must extrapolate the probable rule from the language of decisions dealing with other situations.

EXTENSION AGREEMENTS AND THE STATUTE OF LIMITATIONS

Statutes of limitations in one form or another create problems


111. However, many of these decisions seem patently erroneous in that they overlook the doctrine of "economic compulsion." Id.
which must be surmounted in extending the mortgage. These statutes may raise a presumption that the mortgage is paid. They may prohibit the initiation of a foreclosure action upon the passing of a given period from the maturity date of the mortgage. Or they may provide that the lien of the mortgage will end upon the passage of a given amount of time from the date of maturity. The period of limitations expressed in these statutes varies from the very short to the very long with most of the states settling for some more reasonable time.

The limitations period is tolled by the execution of an extension agreement. While, in the absence of a statute, recording is not necessary to validate the extension agreement between the parties, many states require the recordation of the agreement itself or the making of a marginal notation in a prescribed form.

---


114. Caution must be utilized in relying upon any generalization as each one has its exceptions. Such is the case here as some periods may run from other than the maturity date. See, e.g., the Nebraska statute which runs from the date of the instrument if no maturity date is shown. Neb. Rev. Stat. § 25-202 (Reissue 1964).


118. A state by state discussion of these various statutes of limitations and the time periods embraced therein is found in P. Basye, Clearing Land Titles §§ 76-128 (2d ed. 1970).

119. The only known exception to the rule that an extension agreement tolls the running of the limitations period was found in West Virginia. Now it appears that West Virginia has also provided for the recording of an affidavit which will extend the period. See W. Va. Code Ann. § 55-2-5 (Supp. 1974). The historical development of the West Virginia situation is found in P. Basye, Clearing Land Titles § 126 (2d ed. 1970). See generally Annot., 150 A.L.R. 331 (1944). See also Annot., 142 A.L.R. 615 (1953) which discusses the ability of an assuming grantee to toll the limitations statutes.

120. See 1 G. Glenn, Mortgages, Deeds of Trust and Other Security Devices as to Land § 50.5, at 331-32 (1943).

121. An illustrative form of extension affidavit may be found at 6 C. Nichols, Cyclopedia of Legal Forms § 6.1170, at 1012 (1959); Modern Legal Forms § 5883, at 710 (1972).

if the running of the limitations period is to be tolled. Of course, as an alternative to the extension agreement or marginal notation, a new mortgage or deed of trust may be recorded.\textsuperscript{123} This course, as has been stated, may cause unwanted priority problems, a result which is avoided by utilizing and recording an extension agreement.

Note is also made of the fact that the giving of a new or renewal note will not satisfy the recordation requirement for statute of limitations purposes. A difficulty arises out of the fact that a mortgage transaction is basically a two-document transaction. The promissory note evidences the debt and, in part, embodies the agreement between the parties. The mortgage secures the mortgage debt. The limitation periods for the notes often differ from those for the mortgages.\textsuperscript{124} Furthermore, the periods for the notes often turn on an outdated concept of sealed and witnessed instruments.\textsuperscript{125} It is universally accepted that extension of the note tolls the period of limitations.\textsuperscript{126} The lesson is clear. When a renewal note is given, full discussion on a state by state basis. See also 1 L. Jones, A Treatise on the Law of Mortgages of Real Property § 653, at 939 (8th ed. 1928). Recording acts and extension agreements are also discussed in Meislin, Extension Agreements and the Rights of Junior Mortgages, 42 Va. L. Rev. 939, 942-44 (1956).


an extension agreement should be entered into and recorded, else a statute may extinguish the mortgage.\textsuperscript{127}

**EFFECT OF EXTENSION ON PARTIES WHO ASSUME SECONDARY LIABILITY AT THE TIME THE MORTGAGE IS SIGNED**

It sometimes occurs that a mortgage is given to secure the debt of another. In the corporate mortgage arena, it is not unusual for a parent corporation to guaranty the mortgage of its subsidiary. Likewise, principal shareholders are often called upon to guarantee the mortgages of close corporations. If the mortgagee grants an extension of the time of repayment to the mortgagor, the mortgagor-guarantor will be released.\textsuperscript{128} This is so because the mortgagor-guarantor occupies the position of a surety\textsuperscript{129} and, under suretyship law, the extension agreement is a material alteration of the contract with the mortgagor-guarantor.\textsuperscript{130} It is, therefore, necessary for any guaranty to contain a provision expressly consenting to extensions and modifications and agreeing that no discharge shall result. A suitable provision, signed by the guarantor, may be in the following form:

The makers, sureties, guarantors and endorsers of this note, jointly and severally, do each hereby waive notice of and consent to any and all extensions of this note or any part thereof and any modification of the terms thereof.

Nevertheless, the mortgagee may want to use the suspenders and belt approach to preserve his rights against parties secondarily liable. The mortgagee might find it advisable to include the following clause in the extension agreement:

All rights against all parties other than \underline{__________}, including but not limited to all parties secondarily liable, are hereby reserved.\textsuperscript{131}

\textsuperscript{128} 2 L. Jones, A TREATISE ON THE LAW OF MORTGAGES OF REAL PROPERTY § 1202 (8th ed. 1928).
\textsuperscript{129} Id.
\textsuperscript{131} The effect of such a clause is explained and illustrated in Restatement of Security § 129 (1941), comment d as follows:

Where the creditor grants extension of time of payment to the principal he can reserve his rights against the surety by a reservation as in the case of a release. The reservation of rights must be a part of the extension agreement. Under a reservation against the surety, the surety remains liable and retains his right of reimbursement. Under an extension he not only remains liable and retains his right of reimbursement but the extension is ineffective as to the surety if he wishes to perform and proceed against the principal.
An alternate and probably safer course of action may lie in the mortgagor's insistence that the "guaranty," as originally drawn, be in the terms of an outright, absolute and primary promise to pay the debt.\textsuperscript{132} Such a procedure would insulate the so-called guarantor from events that would discharge a party secondarily liable.

**EFFECT OF EXTENSION ON PARTIES SECONDARILY LIABLE—LAND TRANSFERS AND ASSUMPTIONS**

Where the grantee of mortgaged land has assumed the mortgage, he becomes personally obligated for the payment of the debt.\textsuperscript{133} Although the obligation of the grantor-mortgagor is not removed by the assumption, actions of the parties after the assumption has taken place may have an effect on the relationship between the mortgagor and the mortgagee.

When the assuming grantee enters into an extension agreement without the consent of the mortgagor, the grantor will be released from his obligation.\textsuperscript{134} This result follows on the suretyship theory,

\begin{itemize}
  \item \textsuperscript{132} 38 Am. Jur. 2d Guaranty § 3, at 998 (1968), distinguishes between the guaranty and the primary obligation. Obviously a primary promise to pay creates no suretyship relation.
  \item \textsuperscript{134} 2 L. Jones, A Treatise on the Law of Mortgages of Real Property § 922, at 269 (8th ed. 1928); G. Osborne, Handbook on the Law of Mortgages § 270, at 540 (2d ed. 1970). Osborne spells out a criticism of this result:
  \begin{quote}
  The prevailing view has been criticized. In those jurisdictions using subrogation to the mortgagor's rights or other derivative notions, on which to found the mortgagee's ability to proceed against the assuming grantee personally, impairment of the power to be subrogated to the mortgagee's rights is manifestly an untenable basis for granting a discharge beyond the value of the mortgaged property. "The only right the mortgagee has is to enforce the obligation of the grantee to the mortgagor, and no action of the mortgagee can deprive the mortgagor of this right. He does not need to be subrogated to the right; he has it without subrogation." In jurisdictions where the mortgagee's right is recognized as direct, discharge of the mortgagor to an amount above the value of the mortgaged property has been attacked. It is argued that no possibility of injury exists beyond the value of the property since the extension does not affect his rights other than that of subrogation and they give him in every respect a practical equivalent of it. Any discharge as to this is purely technical. In addition, it is urged that, because the mortgagor does not assume his obligation gratuitously, having received a loan or other value and having usually been the principal debtor for some time, he resembles one of the
  \end{quote}
\end{itemize}
the mortgagor being held to be in the position of a surety\textsuperscript{138} for the assuming grantee. Just as an extension would discharge the surety,\textsuperscript{138} the mortgagor would be discharged.\textsuperscript{137} This result follows because the extension impairs the grantor-mortgagor's (surety's) right of subrogation. If the mortgagor had been called upon to pay the debt at its original maturity, he could have paid and immediately filed foreclosure proceedings since he would be subrogated to the mortgagee's rights. By protecting the grantee against foreclosure until the extended maturity arises, the grantor-mortgagor's subrogation rights are theoretically injured.\textsuperscript{138} If the release is to occur, it seems that the mortgagee must have knowledge of the assumption agreement between the mortgagor and his grantee.\textsuperscript{139} Additionally, the extension agreement must be binding.\textsuperscript{140} To be binding, many authorities require that the agreement be based upon consideration.\textsuperscript{141}

Of course, if the mortgagor-grantor consents to the extension, he will remain liable.\textsuperscript{142} This consent may be given at the time that the extension agreement is entered into or it may be given in advance. The original mortgage may contain a provision binding the mortgagor by any extensions which future owners of the land may enter into with the mortgagee.\textsuperscript{143} Some mortgagees have at-


The majority and minority rules are set forth in Annots., 112 A.L.R. 1324, 1327 (1938); 81 A.L.R. 1016, 1028 (1932); 72 A.L.R. 389, 390 (1931); 41 A.L.R. 277, 282 (1928).


136. See generally 72 C.J.S. Principal and Surety §§ 161 et seq. (1951).


Many authorities are set forth in the A.L.R. annotations cited in note 134 supra.


140. Restatement of Security § 129, comment c, at 347-48 (1941).

141. Annots., 112 A.L.R. 1324, 1337 (1938); 81 A.L.R. 1016, 1022 (1932); 72 A.L.R. 389, 394 (1931); 41 A.L.R. 277, 296 (1928).


143. This is exactly what was done in Guleserian v. Fields, 351 Mass.
tempted to preserve their rights against the mortgagor by drafting extension agreements in such a way as to seemingly reserve their rights against the mortgagor. This may not always work.\textsuperscript{144} As an alternative to an extension agreement, the mortgagee and assuming grantee sometimes enter into a forebearance agreement postponing the mortgagee's right of foreclosure. A rose is a rose, however, and the courts have held this agreement to have the same effect in discharging the mortgagor's personal liability.\textsuperscript{145}

When the grantee merely takes subject to the existing mortgage on the property he assumes no personal liability, the mortgagor and the land remain liable for the debt.\textsuperscript{146} Later, when the non-assuming grantee and the mortgagee extend the time for payment of the loan, the minority rule would release the mortgagor.\textsuperscript{147} It is said that the better and majority rule is that where the mortgagor does not assume payment of the mortgage debt, an extension agreement will not discharge the mortgagor to an extent greater than the value of the mortgaged property at the time the extension is given.\textsuperscript{148} It may be that one of the reasons for this result lies in the fact that absent assumption by the grantee, the grantor is not a surety.\textsuperscript{149}


145. See R. Kratovil, Modern Mortgage Law and Practice § 279, at 192 (1972). See also Uniform Commercial Code § 3-606 (1).


147. The law in this regard is thoroughly set out in Annots., 112 A.L.R. 1324, 1334 (1938); 81 A.L.R. 1016, 1021 (1932); 72 A.L.R. 389, 394 (1931); 41 A.L.R. 277, 292 (1928). See also Stevens, Extension Agreements in the "Subject-to" Mortgage Situation, 15 U. Cin. L. Rev. 58 (1941).


Turning the tables somewhat, the mortgagor and the mortgagee may enter into an extension agreement which will be binding upon the mortgagor's grantee even though he took his interest before the extension agreement was entered into and he did not consent to its execution. The result is the same whether the grantee assumed the mortgage or took subject to it. An opposite result is reached when the extension agreement is entered into after the statute of limitations has run. In that instance, the extension agreement will not prohibit the grantee from raising the statute of limitations as a defense.

This section is a brief, hence a necessarily somewhat generalized statement of complex rules that have been covered adequately elsewhere. All that is needed here is to send a warning.

EXTENSION AGREEMENTS AND NEGOTIABLE PROMISSORY NOTES

Under the Negotiable Instruments Law, most states held that the mortgagor was not discharged by an extension agreement between the mortgagee and an assuming grantee. The theory behind this much criticized rule was that the Negotiable Instruments Law listed those matters that release a party primarily liable, but that list did not include the extension agreement rule. A section of the U.C.C. appears to address itself to this problem by implying that the mortgagor would be discharged by an extension entered into without his consent. The applicability of this provision to

---

150. 17 Texas L. Rev. 222 (1939).
151. Id.
153. Id. § 271, at 544.
154. Osborne states:
The basis for this holding is the general, although almost universally criticized rule that suretyship defenses are not available to one who appears as primarily liable upon the face of a negotiable instrument, it being the legislative intent in adopting the Uniform Act to abrogate all existing suretyship law with reference to negotiable instruments in the interests of uniformity.
155. Uniform Commercial Code § 3-606 provides:
(1) The holder discharges any party to the instrument to the extent that without such party's consent the holder
(a) without express reservation of rights releases or agrees not to sue any person against whom the party has to the knowledge of the holder a right of recourse or agrees to suspend the right to enforce against such person the instrument or collateral or otherwise discharges such person, except that failure or delay in effecting any required presentment, protest or notice of dishonor is effective or unnecessary; or
mortgage law is far from a settled question.\textsuperscript{156} Courts have decided the issue by reliance upon old law and without reference to the U.C.C.

To the mortgage lender the course of action is clear. He must protect himself from falling into this quicksand of the law by providing in the original mortgage and note for the continued liability of the mortgagor and all other parties secondarily liable (e.g., guarantors) in the event that an extension is given to a subsequent owner of the property.

A suitable clause may be:

The mortgagor and all other parties who are or hereafter may become secondarily liable for the payment of the obligation evidenced by this note, do hereby agree to remain liable to the mortgagee, his successors and assigns, in the event that any extension of the time for repayment is given to the mortgagor or his successors in interest.

CONCLUSION

Mortgage extensions, modifications and substitutions create a wide diversity of legal problems. Every act a first mortgagee contemplates must be preceded by sober reflection and sound legal advice as to the consequences of this act upon junior lienors and parties liable for payment of mortgage debt.

\textsuperscript{156} See, e.g., United America Life Ins. Co. v. Pecillo, 462 F.2d 252, 257-58 (9th Cir. 1972); Turfees, Inc. v. Frederick Prod. Credit Ass'n, 265 Md. 679, 291 A.2d 643, 647 (1972).