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Does Virginia Have a Title-Quieting Statute Applicable to Deeds of Trust?

HARRY L. SNEAD, JR.

A title examiner finds a recorded deed of trust which has not been released on the margin. He does not find a recorded release deed. A perusal of the records, however, reveals that twenty-one years have elapsed from the maturity date of the note secured by the deed of trust. The title examiner adverses the trustee (or, as a short-cut, the grantor of the deed of trust), but does not find a record conveyance from the trustee. May the title examiner safely ignore the deed of trust?

The question, provoked by the case of *Chavis* v. *Gibbs,* 198 Va. 379 (1956), cannot be answered with either a clear "yes" or a clear "no."

In the cited case, one Chavis bought land expressly subject to a recorded but unreleased deed of trust to secure the payment of certain notes. Chavis promptly recorded his deed. The record does not disclose that Chavis made any attempt to ascertain the status of the notes secured by the deed of trust. Unknown to Chavis, twelve years prior to his purchase the trustee had sold the land pursuant to the terms of the deed of trust. The grantees from the trustee withheld their deeds from record until shortly after Chavis had recorded. Gibbs bought from the trustee's grantees and promptly recorded his deed. The Supreme Court of Appeals of Virginia, in an opinion by Mr. Justice Spratley, affirmed the trial court's holding that Chavis was a purchaser with notice under Va. Code Ann. § 55-96 (1950) and hence his prior recordation was unavailing. The court very carefully and deliberately reserved for future decision the question of whether Chavis would have been a purchaser with notice had he made a reasonable attempt to ascertain the status of the notes and been unable to locate the noteholder or some other person who could furnish him with

reliable information as to whether the notes had been paid or the title transferred by foreclosure.

Although the exact holding was amply supported by legal authorities from other jurisdictions, Mr. Justice Spratley also suggested, but did not enlarge upon, the underlying practical considerations:

> There is usually a delay after a foreclosure sale under a deed of trust before the deed pursuant thereto can be executed and delivered. Often time is needed to examine titles, correct title defects, if any, and to provide the consideration.
>
> ... Moreover, the consideration for the conveyance was the amount paid for the equity of redemption, plus the amount due on the notes, with interest, if any. Only by obtaining information of the amount owing on the notes could Chavis arrive at the value of the equity of redemption and determine the whole cost of the land to him. If reasonable and prudent inquiry had been made and full answers obtained, he would have discovered that because of default in the payment of the notes, the property had been sold in accordance with the provisions of the deep of trust. Pp. 386-87.

It is the opinion of this writer that had the Court held that Chavis was a purchaser *without* notice, then assuming that other law remained the same, to safely foreclose under a deed of trust the sale would have to be conducted, title examined, and the deed delivered and recorded in one continuous, uninterrupted transaction taking place in the Clerk's Office.

For an examining attorney who finds an outstanding deed of trust on which the statute of limitations, Va. Code Ann. § 8-11 (1950), has obviously not run, this decision leaves unchanged the present practice of simply reporting the deed of trust as an objection and leaving to the purchaser the duty of seeing to the status of the reported objection.

As an additional reason for its holding, the Court relied on a 1942 amendment to Va. Code Ann. § 8-11 (1950). This section, the statute of limitations on deeds of trust, creates a limitation of twenty years from the maturity of the note plus

"one year for the death of any party in interest." This limitation, however, is only on the power of the trustee to make sale, that is, to enforce the lien of the deed of trust.

The 1942 amendment added the following sentence:

> Unless the deed or deeds executed pursuant to the foreclosure of any mortgage or to the execution or sale under any deed of trust be recorded in the county or corporation where the land is situated within one year after the time the right to enforce the mortgage or deed of trust shall have expired as hereinabove provided, such deed or deeds shall be void as to all purchasers for valuable consideration without notice and lien creditors who shall make any purchase or acquire any lien on the land conveyed by any such deed prior to the time such deed is so recorded.

Va. Code Ann. § 8-12 (1950), imposing a similar period of limitation where there is no maturity date specified in the deed of trust, does not contain this amendment. This obvious oversight should be corrected by legislative action.

It is interesting to note that, theoretically at least, prior to the 1942 amendment to section 8-11, if a trustee sold during the "20-plus"-year period, a purchaser from the trustee could wait indefinitely to record his deed, because a purchaser of the equity of redemption would always be a purchaser with notice and not protected by section 55-96.

Apparently, prior to the 1942 amendment an examining attorney had no "complete" statute of limitations on deeds of trust; although the statute might have run on the trustee's right to sell, the examining attorney could not certify "no lien" unless he went outside the Clerk's Office and found out whether a sale had been made during the "20-plus"-year period and the purchaser's deed not recorded. The net result: an ineffective statute of limitations insofar as it aided in clearing land titles.

The 1942 amendment gives purchasers from a trustee one year after the right to enforce the deed of trust has expired within which to record their deeds. Here the 1942 amendment

attempted to do what a "land title" statute of limitations should do: make it possible for an examining attorney to keep his feet in the Clerk's Office and from the records before him render an opinion of "valid lien" or "invalid lien." For, by relating the time within which a purchaser from a trustee has to record to the time within which the trustee can enforce the lien of the deed of trust, the examining attorney, after making simple mathematical computations, can render an opinion. No *dehors* the record stuff involved—not up to this point, anyway.

Two major problems remain. First, the construction to be given the words "such deed or deeds [from the trustee] shall be void as to all purchasers for valuable consideration, without notice" as used in the amendment to section 8-11. The context in which the words are used is convincing evidence that, as used therein "without notice" means without *actual* (or non-record) notice of the trustee's sale or the delivery of a deed by the trustee, as distinguished from the constructive notice given by the recordation of the deed of trust. *Chavis* v. *Gibbs* did not decide this point. It remains for future litigation or legislation to clarify the statute. The latter would be preferable.

Second, section 8-11 requires that to the 20-year period for enforcement of the lien of a deed of trust there be added "one year for the death of any party in interest." Who are these parties in interest? Noteholder? Trustee? Grantor? All three? The Court, in *Boggs* v. *Fatherly,* 177 Va. 259 (1941), as one of the reasons for the conclusions reached therein, stated that a trustee was not a "party in interest," but suggested that the noteholder and the holder of the equity of redemption (grantor) could be "parties in interest" within the meaning of section 8-11. Therefore, it is submitted that the prudent title examiner, before concluding that the statute of limitations has run, should affirmatively establish that the note-holder and grantor are living (this means going outside the record), or assume that those not known to be living are dead. In short, if an examining attorney does not know the fact of life or death, he should add at least two years to the twenty years specified by the statute.

But a nasty possibility lurks in this thicket. Suppose *successive* noteholders or trustees have died. Suppose *successive* holders of the equity of redemption have died. Would their respective one-year periods of extension be added together? No help from the statute here. No case law. It is conceivable that the statute *could* be interpreted to require this adding together. Here the title examiner must take a calculated risk—a thing familiar to title examiners. I cast my ballot in favor of taking this risk; an interpretation of the statute which would allow totaling these periods would seriously cripple the statute's effectiveness as a means of aiding an examining attorney in settling the "lien" or "no lien" question without having to make a diligent investigation outside of the Clerk's Office.

Although the bases on which they rest are not free from doubt, the following conclusions seem indicated: (1) A purchaser from a trustee has one year after the right to enforce the deed of trust has expired (as provided by the first paragraph of section 8-11) within which to record his deed; (2) an examining attorney who does not know with certainty whether all successive noteholders and all successive holders of the equity of redemption were alive at the time the transfer of their interest was effected (and that the present holder of record is now alive) should, for safety's sake, add a minimum of two years to the twenty years specified by the first part of section 8-11; (3) this means that a total of twenty-three years from the date of maturity of the note must elapse before an examining attorney can certify "no lien" with reasonable safety; but (4) one year can be subtracted from this total for each one of the two "parties in interest" if the examining attorney knows that the present holder of that interest is alive *and* his predecessors were alive at the time of effecting the transfer of their interest.