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Statutory Redemption Rights

F. C. Hackman

STATUTORY REDEMPTION RIGHTS

Herein will be discussed some of the problems which arise under the provisions of the code of Washington granting the right to redeem from execution sales of real property

These rights do not come into existence until the moment such a sale has been made,[1] and are exclusively statutory creations,[2] so that all the particulars of these rights must be ascertained and determined from the terms of the code provisions relating thereto. These statutes are benevolent[3] and remedial[4] in character, having as their main object the prevention of the oppression of a debtor and the sacrifice of his property.[5] They are, therefore, highly favored[6] and in generally liberally construed,[7] in order that the property of a debtor may pay as many of his liabilities as possible.[8] But they should not be so construed as to enlarge or extend their terms by implication beyond what the legislature has authorized or intended.[9] Thus, the statutes are strictly construed to determine the time for redemption,[10] the conditions imposed,[11] and the classes which come within their provisions;[12] but a liberal construction is

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[1] *Dane v. Daniel*, 23 Wash. 379, 63 Pac. 268 (1900) *Hardy v. Herriott*, 11 Wash. 460, 39 Pac. 958 (1895).

[2] *Schmidt v. Worley*, 134 Wash. 582, 236 Pac. 111 (1925) *Dane v. Daniel*, Note 1, *Hays v. Merchants' Bank*, 14 Wash. 192, 44 Pac. 137 (1896) *Knipe v. Austin*, 13 Wash. 189, 43 Pac. 25, 44 Pac. 531 (1895) *Hardy v. Herriott*, Note 1, *Scott v. Patterson*, 1 Wash. 487, 20 Pac. 593 (1889).

[3] *Scott v. Patterson*, Note 2.

[4] *Muller v. Harrison*, 46 S. D. 295, 192 N. W 750 (1923).

[5] *Scott v. Patterson*, Note 2.

[6] *Union Esperanza M. Co. v. Shandon M. Co.*, 18 N. M. 153, 135 Pac. 78 (1913).

[7] *Scott v. Patterson*, Note 2; *Whitehead v. Hall*, 148 Ill. 253, 35 N. E. 871 (1893) *Northern Central R. Co. v. Hering*, 93 Md. 164, 48 Atl. 461 (1901) *Lightbody v. Sammers*, 98 Minn. 203, 108 N. W 846 (1906) and cases in Note 8.

[8] *Kofoed v. Gordon*, 122 Cal. 314, 54 Pac. 1115 (1898) *Stevenson v. Sebring*, 63 Colo. 4, 164 Pac. 308 (1917) *Schuck v. Gerlach*, 101 Ill. 338 (1882) *Hervey v. Krost*, 116 Ind. 268, 19 N. E. 125 (1888) *King v. Bender*, 116 Fed. 813 (C. C. A., 9th, 1902) *Rambeck v. LaBree*, 156 Minn. 310, 194 N. W 643 (1923).

[9] *Union Esperanza M. Co. v. Shandon M. Co.*, Note 6, *Thornley v. Moore*, 106 Ill. 496 (1883) *Duiley v. Davis*, 69 Ill. 133 (1873) *Little v. People*, 43 Ill. 188 (1867).

[10] *Union Esperanza M. Co. v. Shandon M. Co.*, Note 6, *Fort Wayne Builders S. Co. v. Pfeiffer*, 60 Ind. App. 615, 111 N. E. 192 (1916)

[11] *Union Esperanza M. Co. v. Shandon*, Note 6.

[12] *Aiken v. Bridgeford*, 84 Ala. 295, 4 So. 266 (1888) *Dickenson v. Duckworth*, 74 Ark. 138, 85 S. W 82 (1905) *Pollard v. Harlow*, 138 Cal. 390, 71 Pac. 648 (1903) *Bennett v. Wilson*, 122 Cal. 509, 55 Pac. 390, 68 A. S. R. 61 (1898) *Suttles v. Sewell*, 105 Ga. 129, 31 S. E. 41 (1898) *Beadle v. Cole*, 173 Ill. 136, 50 N. E. 809 (1898) *Hervey v. Krost*, Note 8; *Ft. Wayne Builders S. Co. v. Pfeiffer* Note 10; *Cooper v. Maurer*, 122 Ia. 321, 98 N. W 124 (1904).

given the statutes to make them effective as to those who are granted the right,[13] and in favor of the right in cases of doubt or ambiguity [14]

Under the code of Washington every sale of an estate or interest in real property pursuant to an "execution, decree or order of sale" is made subject to redemption, with the single exception that such a sale of a leasehold of less than two years unexpired term is absolute, that is without redemption.[15] It is also the law in this jurisdiction, settled by judicial decisions, that a sale of real property subject to redemption, whether made by virtue of a judgment at law or a decree in equity, does not divest the owner of his legal title or transfer it to the purchaser at the sale. During the entire period of redemption and until execution and delivery of sheriff's deed, the legal title remains in the owner. The sale merely operates to suspend, and not to remove, the lien of the judgment or decree under which the sale was made and all subsequent liens.[16]

The statute gives the judgment debtor, or his successor in interest, the right to redeem.[17] A judgment debtor is "a person against whom a judgment for, or directing the payment of, a sum of money may be enforced."[18] A person does not become a "judgment" debtor by execution and delivery of his note and mortgage securing an indebtedness, on obtaining merchandise on credit, or a loan of money, or by the commission of a tort for which he is liable in damages. It is only when and not until a judgment has been rendered against him for a sum in money found due on account of any such or other liability, that he becomes, or acquires the status of, a judgment debtor. It is unquestionable, therefore, that the "judgment debtor" referred to in the redemption statute under consideration is that person, natural or artificial, who is adjudged to owe and must pay the sum found due in the judgment or decree pursuant to which an execution sale is made.

Since the statute expressly gives the judgment debtor the right to redeem, he is generally held to have that right notwithstanding

[13] *Ft. Wayne Builders S. Co. v. Pfeiffer* Note 10.

[14] *Danenhauer v. Dawson*, 65 Ark. 129, 46 S. W 131, 44 L. R. A. 193 (1898) *Bruschke v. Wright*, 166 Ill. 183, 46 N. E. 813, 57 A. S. R. 125 (1897).

[15] Sess. L. 1899, p. 87, Sec. 5, Sec. 584 Rem. Comp. Stat.

[16] *Ford v. Nokomis State Bank*, 135 Wash. 37, 237 Pac. 314 (1925), (judgment at law) *Cochran v. Cochran*, 114 Wash. 499, 195 Pac. 224 (1921) (decree in equity· *Singly v. Warren*, 18 Wash. 434, 51 Pac. 1066, 63 (1921) (decree in equity) *Singly v. Warren*, 18 Wash. 434, 51 Pac. 1066, 63 A. S. R. 896 (1898) *Knowles v. Rogers*, 27 Wash. 211, 67 Pac. 572 (1902).

[17] Sec. 594, Rem. Comp. Stat.

[18] Webster's New International Dict.

he never had any, or has parted with all, interest in the land.[19] As said in one case:[20]

> "The statute provides that the judgment debtor, as such, may redeem, not that he may redeem only, and in the event, that he has no successor in interest in the property sold under execution. There is no good reason why the statute, which is remedial in its character, should receive a narrow construction, in order to defeat the right of redemption which it intended to give. It might be that the judgment debtor has covenanted with his successor in interest to effect a redemption from the sale, and a variety of other cases might readily be imagined in which the judgment debtor, even though he had sold the property, could still have an interest in effecting a redemption from the execution sale."

And in another:[21]

> "The right of the judgment debtor whose title has been sold on execution to redeem from the sale does not depend upon the condition of his title at the time of the sale or redemption. The language of the statute is direct and unambiguous. The right is given to the person against whom the execution issued, and whose title was sold thereon. It follows the person and not the land, and continues for the period allowed by law, although the debtor meanwhile may have parted with his title. The right secured by the judgment debtor to redeem, although he has conveyed the land, is often an important and valuable one. Where he has conveyed with warranty, he is enabled thereby to protect the title of his grantee, and secure himself against liability, and if he has received a full consideration for the land, it is just and equitable that he should discharge it by redemption, from the lien acquired by the purchaser on the sale, although he may not have bound himself by any covenant to do so. Nor is there any incongruity in holding that the right of redemption co-exists in the judgment debtor and his grantee. Where the former has conveyed the land his redemption will inure to the benefit of the holder of the legal title, and the owner has the means of protecting his own interest, if the judgment debtor is either unable or unwilling to make the redemption."

The successor in interest of the judgment debtor may redeem. Who is successor in interest? The statute formerly in force in

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[19] *Henderson v. Prestwood*, 114 Ala. 464, 22 So. 15 (1897) *Southern California Lumber Co. v. McDowell*, 105 Cal. 99, 38 Pac. 627 (1894) *Yoakum v. Bower*, 51 Cal. 539 (1876) *Floyd v. Sellers*, 7 Colo. App. 491, 44 Pac. 371 (1896) *Livingston v. Arnoux*, 56 N. Y. 507 (1874) *Lorenzana v. Camarillo*, 45 Cal. 125 (1872).

[20] *Yoakum v. Bowers*, Note 19.

[21] *Livingston v. Arnoux*, Note 19.

Oregon was identical in terms to this present Washington statute.[22] In the former state, the foreclosure of mortgages and other liens has been and is governed by statute, a former provision of which declared a decree foreclosing a mortgage or other lien "shall have the effect to bar the equity of redemption"[23] of all parties defendant in and to the land involved. In construing these former provisions, the Supreme Court of Oregon has held[24] that a decree foreclosing a mortgage extinguishes all titles of all parties defendant in and to the mortgaged land, designates some person debtor, thereby bringing into existence the judgment debtor, who as such had no previous existence, and upon whom the statute confers the right of redemption. This right arises when a sale is made pursuant to the decree, and the "successor in interest" of the judgment debtor is one to whom that debtor conveys, assigns, or transfers his right of redemption after it accrues, viz after the execution sale. So the owner of the land at the time of that sale is not entitled to redeem unless he is the judgment debtor, notwithstanding that such owner acquired title from or through the judgment debtor and is his successor in interest in the ordinary acceptance of that term. In support of this view the court, in the case under consideration, said

> "The right of redemption is a creation of the statute, and arises only after a sale upon a decree including a personal judgment against a defendant. When this right accrues, it may be transferred by the judgment debtor to any one, and the latter then becomes a successor in interest. Evidently it is to such a person purchasing from the judgment debtor after the sale that the redemption section refers in speaking of the 'judgment debtor or his successor in interest.' The foreclosure extinguished all titles junior to the mortgage. None of the previous holders having such estates could redeem, as none of them is in the category of redemptioners. That litigation stripped the land of all claims subsequent to the mortgages and offered the naked legal title for sale so as to create a fund to which alone they could look for payment. The

[22] Statute quoted in *Higgs v. McDuffie*. 51 Or. 265, 157 Pac. 794 (rehearing 158 Pac. 953). This decision was rendered in 1916. The following year the legislature amended the statute to set aside the rule announced in this decision. See Oregon Laws 1917, ch. 532, Olson's 1920 Oregon Code, Sec. 245. This section of the Oregon Code differs, therefore, very radically from the corresponding Washington law

[23] Statute is quoted in *Higgs v. McDuffie*, Note 22. This quoted section, like the other referred to in Note 22, was changed at the 1917 session of the Oregon legislature, to set aside the rule announced in this case. The provision that a decree shall foreclose all equity of redemption was eliminated. See Olson's 1920 Oregon Code, Sec. 427.

[24] *Higgs v. McDuffie*, Note 22.

> land was subject to redemption by the judgment debtor who came into being at the rendition of the decree, and not before. This individual, having no existence prior to the decree with its feature of personal judgment, is the only one entitled to redeem."

The Oregon court did not consider the effect of redemption by a judgment debtor who has no title to the land.

To make this rule clear, suppose A, owner, mortgaged to B, then conveyed to C, subject to the mortgage which C assumed and agreed to pay, and C conveyed to D. B foreclosed his mortgage, making A and D defendants, with judgment against A, and the property was sold to X. After sale and during the statutory period of redemption, X obtained a deed from D. Under the Oregon rule A, being the judgment debtor, may redeem, but the decree extinguished the title of D, so he cannot redeem, and having no title, his deed to X conveyed no interest whatever in the land.

As this decision involves the interpretation of a statute designating those who may redeem in terms similar to that of this state, it would be profitable to discuss the divers and serious consequences flowing from the decision if it be a sound precedent here.

Is it such a precedent?

It is not.

The decision is based upon the Oregon statutory declaration that a decree foreclosing a mortgage or lien "shall have the effect to bar the equity of redemption" of all defendants in the land involved in the foreclosure, that is, to extinguish their titles and estates. That such is the effect of a foreclosure decree in this (Washington) state has been presented as an issue to the Supreme Court and decided to the contrary,[25] and the decision has been consistently adhered to. Neither decree nor sale has that result. As hereinbefore stated, title remains in the owner, and liens on the property are merely suspended, during the redemption period.[26] Neither judgment, decree, or sale deprive the owner of his legal title, but the sale operates to confer a right, that of redemption. The statute expressly declares, "if the judgment debtor redeem, the effect of the sale is terminated and he is restored to his estate."[27] The same result follows redemption by

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[25] *De Roberts v. Stiles*, 24 Wash. 611, 64 Pac. 795 (1901). Appellant's brief in this case presented the same theory adhered to in the *Higgs v. McDuffie* case, but the Supreme Court refused to adopt it as shown by the decision.

[26] See Note 16.

[27] Sec. 597, Rem. Comp. Stat.

the "successor in interest" of the judgment debtor.[28] Redemption by either merely terminates or sets the sale aside, leaving title to the estate sold in the same condition it was before sale, except to the extent a lien is discharged by the payment made to effect redemption.[29] Consequently, where the owner and the judgment debtor are not the same person, the debtor cannot, by conveyance of the land, or assignment of his right to redeem, after the execution sale, vest title to the property in some person not the owner. In these cases, where the owner claims through the judgment debtor as predecessor in ownership, either the owner, as successor in interest of the debtor, or the debtor, or one to whom he may assign his right,[30] may redeem. But redemption by either of the latter two merely inures to the benefit of the owner,[31] since the whole effect of redemption is to set aside the sale. The owner does not thereby get an "after-acquired" title, because he has title. To restrict the term "successor in interest" of a judgment debtor to one to whom the debtor may assign or transfer his right of redemption after the sale, would, in all cases where the debtor is not the owner, defeat the object and purpose of the statute.

There are instances where the owner does not have a legal right of redemption. For example, A, owner, mortgages his land to B to secure an indebtedness of C to B, for which A is not personally liable. Upon foreclosure, the judgment debtor would be C, and A would not be his successor in interest. However, there can be no question that A would be held subrogated upon equitable principle to C's right of redemption.

Where a mortgagor has conveyed his land to a grantee who assumed and agreed to pay the mortgage, and where the mortgage was subsequently foreclosed with personal judgment against the mortgagor and sale made for less than the amount adjudged due, from which sale the grantee redeemed, then upon payment of the deficiency by the mortgagor, the latter is entitled to subrogation to the rights of the mortgagee, and may effect a resale of the property to enforce payment of the deficiency by the grantee.[32]

As redemption by the judgment debtor or his successor merely terminates the sale, all liens upon the land suspended as a result

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[28] *De Roberts v. Stiles*, Note 25, *Ford v. Nokomis State Bank*, Note 16.
[29] Cases in Note 28.
[30] *Schumacher v. Langford*, 20 Cal. App. 61, 127 Pac. 1057 (1912) *Big Sespe Oil Co. v. Cochran*, 276 Fed. 216 (C. C. A., 9th, 1921)
[31] *Livingston v. Arnoux*, Note 19· *Bateman v. Kellogg*, 59 Cal. App. 464, 211 Pac. 46 (1922).
[32] *Bollong v. Corman*, 125 Wash. 441, 217 Pac. 27 (1923).

of the sale are reinstated when either of those parties redeeems.[33]

The Supreme Court has not yet decided the effect of redemption in a case like this. Suppose A, owner, mortgaged to B, then deeded to C subject to the mortgage, which C did not assume and agree to pay B foreclosed, making A and C defendants, got judgment against A for the amount due and deficiency, and execution sale was made for less than the amount of the judgment. The judgment is not against C. He was not personally liable for the debt or for the deficiency So far as he was concerned, the land alone could be sold to pay the mortgage. If, in this case, C redeems, would the deficiency judgment against A be reinstated, and the land be subject to execution sale on account thereof? C, it must be noted, did not acquire title from A *after* entry of the ejudgment, but *before,* and if he redeems, he can only do so as successor in interest of the judgment debtor, A. According to a decision of the Supreme Court of Oregon, the deficiency against A, not having been a lien on the premises when C acquired title, will not be a lien on the land if C redeems, by the sale B exhausted his remedy afforded by the mortgage.[34] In support of this rule, the Supreme Court of Oregon has said:[35]

> "A mortgage is a specific lien, which attaches by vir tue of the contract of the parties concerned, but the lien of a judgment is general, and attaches by operation of law, as a sequence of its rendition. Foreclosure is a remedy by which the property covered by the mortgage may be subjected to sale for the payment of the demand for which the mortgage stands as security, and, when the decree is had and the property sold to satisfy it, the mortgagee has obtained all he contracted for, but, if there is also a personal decree against the mortgage debtor, this

[33] Cases in Note 28. Decisions of the California courts on an issue of this kind are not and cannot be precedents here in Washington, because of the difference in the system between the two states in respect to decrees of foreclosure. In California the docketing of a judgment of foreclosure does not create a lien even for deficiency on the property of the debtor. Under the rule there since 1860, the docketing of a deficiency only creates a lien. The amount of the deficiency is ascertained after and as a result of the sale, and no deficiency can be docketed until after the sheriff makes the sale and ascertains as a result what deficiency, if any, there is, and makes a return showing the deficiency. Then it may be docketed, and when docketed is effective as a lien. 18 Cal. Jurisprudence, pages 496 et seq., Secs. 730 et seq. Here, as elsewhere stated in the article, a decree foreclosing a mortrage is a general lien from the time of its entry. Under the California rule the grantee, after sale, of the judgment debtor takes title free from any lien for the deficiency· but if the judgment debtor redeem it reattaches. *Simpson v. Castle,* 52 Cal. 644 (1878) *Calkins v. Steinbach,* 66 Cal. 117, 4 Pac. 1103 (1884).

[34] *Willis v. Miller,* 23 Ore. 352, 31 Pac. 827 (1893).

[35] Case in Note 34.

> becomes, from the date of its docketing, a general lien upon his real property, as in case of a judgment, and if a deficiency remains after the application of the proceeds of the sale of the lands covered by the mortgage, the decree may be enforced by execution, as in other cases. The resale does not take place under the order of the sale of the specific property covered by the mortgage lien, for that has been exhausted, but under the personal decree which remains as a deficiency decree against the mortgage debtor after the application of the proceeds arising under the order of sale, and a redemption will not reinstate the specific mortgage lien, while it will the general lien acquired by the personal decree. This distinction is clear, and is bottomed both upon principle and authority The redemption is from the sale, and not from the mortgage, and if the lien of the personal decree has never attached, by reason of the mortgagor not having the fee of the property at the time it was rendered, there never existed any lien to be reinstated against his successor in interest, who purchased prior to the decree."

It is true that here in Washington a mortgage foreclosure decree operates as a general judgment lien on the debtor's property, and a "deficiency judgment" is but a portion of the judgment remaining unpaid after part payment either by the debtor or as a result of an execution sale, and does not have to be docketed as a separate judgment to be operative as a lien.[36] But in the supposed case, the judgment debtor did not own the land at the time of entry of the judgment, and so the judgment could not operate as a lien thereon. The land was sold because of the lien of the mortgage foreclosed by the decree, and discharged by the sale, leaving a deficiency on the judgment, which was not a lien on the premises. There being no relationship of principal and surety between A and C as to liability for the mortgage, and no personal obligation therefor on the part of C to B, there is no occasion for preservation of the mortgage lien to accomplish equities between the parties. If C purchased from A after the sale and redeemed, the deficiency, not the mortgage lien, would attach. So, in the supposed case, it seems plain that if C redeem, the mortgage lien could not reattach, because discharged, and the deficiency could not, because it never had been and could not be a lien.

Since a deficiency judgment cannot be rendered against a nonresident served with process by publication and who does not

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[36] *Codd v. Von Der Ahe*, 92 Wash. 529, 159 Pac. 686 (1916) *Fuller & Co. v. Hull*, 19 Wash. 400, 53 Pac. 666 (1898) *Shumway v. Orchard*, 12 Wash. 104, 40 Pac. 634 (1895) *Hays v. Miller* 1 W T. 143 (1861)

appear in the action or suit, the deficiency is not reinstated as a lien on the land when redeemed by the judgment debtor.[37]

Other than the judgment debtor or his successor, the only persons granted the right to redeem are those who have "a lien by judgment, decree, or mortgage on any portion of the property, or any portion of any part thereof separately sold, subsequent in time to that on which the property was sold."[38] These creditors are termed redemptioners. The statute is clear and unambiguous. To redeem a creditor must have a lien by judgment, decree or mortgage. So the holder of a lien by attachment, or of a laborer's, mechanic's, materialman's, or contractor's lien has no right to redeem by virtue thereof. Of course, when any such lien has been reduced to judgment, the holder then has a lien by judgment with the same rights any other judgment creditor has.[39] Furthermore, in order to redeem, the creditor must have a lien by judgment, decree, or mortgage "subsequent in time to that on which the property was sold." The word "that" in this quoted phrase refers to the lien the sale was made to satisfy[40] Thus, where property is subject to a mortgage and junior lien, and the mortgage is foreclosed and sale made, the mortgage lien (and not the lien of the decree of foreclosure), is "that on which the property was sold," so that the junior lien is "subsequent in time" thereto, (though prior to the lien of the foreclosure decree,) and its holder may redeem.

Since a creditor must have a lien "subsequent in time to that on which the property was sold" to be entitled to redeem, it follows that a creditor may not redeem from his own sale, a sale made to satisfy his own lien. That the sale results in a deficiency does not change this rule, as the deficiency is not a lien subsequent to that which the sale was made to satisfy So where a plaintiff by his complaint, and defendants or intervenors by cross-complaints, in one suit, seek foreclosure and execution sale in satisfaction of their mortgages or liens, and obtain a decree adjudging the amount due each, fixing the order of priority, ordering the property sold and distribution of proceeds among the parties in the order of their rank, the sale is for and on behalf of each and all, and no one or class of these parties has any right of redemption, even

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[37] *Herron v. Allen*, 32 S. D. 301, 143 N. W 283 (1913) *Howard v. McNaught*, 9 Wash. 355, 37 Pac. 455, 43 A. S. R. 837 (1894).

[38] Sec. 594, Rem. Comp. Stat.

[39] *Paddack v. Staley*, 13 Colo. App. 363, 58 Pac. 363 (1899)

[40] *Eldridge v. Wright*, 55 Cal. 531 (1880) *Hervey v. Krost*, Note 8; *Western Land & Cattle Co. v. National Bank of Arizona*, Note 41.

though the proceeds of the sale be insufficient to pay the full amount due some.[41] As said of a case of this character:[42]

> "There was one decree, and it was the decree of all the lienholders. The decree authorized one sale, and it was the sale of all the judgment creditors. If the property had sold for enough to satisfy the judgment of appellee (a lienholder given judgment in the cause,) in whole or in part, it could not be doubted that the sale was on its own judgment, and the fact that it did not sell for enough to satisfy its judgment does not change the principle which governs the case. The decree directed the property to be sold to pay all the liens, and made provision for distribution to the appellee and all other lien holders, so that there could only be one sale. * *
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> "As the law contemplates a final decree adjusting all rights and equities, and as such a decree was rendered in the foreclosure suit involved in this case, it necessarily results that a sale upon that decree was a sale on all the judgments embodied in it. This being true, it must also be true that none of the claimants in whose favor a judgment was incorporated in the decree of the court can redeem from the sale made by the decree."

The code provisions[43] governing liens of laborers, mechanics, and materialmen especially provides that such liens may be foreclosed and enforced in a civil action, that all persons who, prior to the commencement of such action, shall have filed liens against the same property *shall* be joined as parties, and no person *shall* begin an action to foreclose his lien while a prior action is pending, to which he may apply to be made a party and in which his lien may be foreclosed. Furthermore, in every case in which different or various liens are claimed on the same property, the court *must* fix the rank thereof in the order specified in the statute, and the proceeds of the sale must be applied to each lien or class of liens in the order of its rank, and

> "personal judgment may be rendered in an action brought to foreclose a lien against any party personally liable for any debt for which the lien is claimed, and if the lien be established, the judgment shall provide for the enforcement thereof upon the property liable as in case of foreclosure of mortgages, and the amount realized

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[41] *Western Land & Cattle Co. v. National Bank of Arizona*, 28 Ariz. 270, 236 Pac. 725 (1925) *McCullough v. Rose*, 4 Ill. App. 149 (1879) *Horn v. Indianapolis National Bank*, 125 Ind. 381, 25 N. E. 558, 21 A. S. R. 231, 9 L. R. A. 676 (1890) *Laurat v. Stratton*, 11 Fed. 107 (C. C., D. Ore., (1880) *Hayden v. Smith*, 58 Ia. 285, 12 N. W 289 (1882) *Clayton v. Ellis*, 50 Ia. 590 (1879).

[42] *Horn v. Indianapolis Nat. Bank*, Note 41.

[43] Rem. Comp. Stat. (Wash., 1922), § 1129 et seq.

> by such enforcement of the lien shall be credited upon the proper personal judgment and the deficiency, if any remaining unsatisfied shall stand as a personal judgment, and may be collected by execution against the party liable therefor."

These statutes clearly require that where there are two or more liens on one tract or lot, they must be foreclosed in one suit. The sale in such cases is necessarily for and on behalf of each and all, so none has any right to redeem, even though not paid by reason of the insufficiency of the proceeds of the sale. As heretofore stated, these lien claimants have no right of redemption by virtue of their lien,—not being creditors having a lien by judgment, decree, or mortgage,—and consequently a lien claimant cannot elect to preserve a right of redemption as mortgagees and judgment creditors may do in foreclosures as related in the succeeding paragraphs.

Since a creditor may redeem who has a lien by judgment, decree, or mortgage subsequent in time to that on which the sale was made, a junior mortgagee or judgment lien claimant, who is defendant in a suit to foreclose a senior mortgage, may elect, in simple cases at least, to obtain foreclosure of his own lien and thereby lose his right of redemption, or to waive foreclosure and preserve his redemption right. For example, A, owner, mortgages to B, and then to C. B institutes suit to foreclose his mortgage, making A and C defendants, and alleges in the usual form that C has or claims to have some right, etc., in the land,which, if any he has, is junior, subordinate, etc. to plaintiff's mortgage, and praying that it be so adjudged. In this supposed case C can pursue one of several courses.

1. C can default. Judgment will be in favor of B, with resultant sale for satisfaction of B's mortgage only The mortgage lien of C being "subsequent in time to that on which the property was sold" enables him to redeem. This is so although the decree fix the amount due C and directs any surplus remaining after payment of B be applied on C's mortgage.[44]

2. C may appear and answer, asking application of any surplus after payment of B, be applied on his, C's, mortgage. In this case C may redeem.[45]

3. C may appear and answer, admitting B's allegations, or deny

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[44] *Frink v. Murphy*, 21 Cal. 108 (1862) and comment on this case in *Black v. Gerichten*, 58 Cal. 56 (1881) *Ft. Wayne Builders S. Co. v. Pfeiffer*, Note 10; *Laurist v. Stratton*, Note 41.

[45] *Camp v. Land*, 122 Cal. 167, 54 Pac. 839 (1898)

the same and pray dismissal. From the sale on B's behalf, C may redeem.[46]

4. C may answer and cross-complain praying foreclosure of his mortgage. The decree in favor of B and C foreclosing their mortgages and ensuant sale, is for and on behalf of both B and C, and C cannot redeem. This is so although the sale does not produce enough to pay the amounts due B and C.[47]

As said in one case:[48]

> "A mortgagee cannot redeem from a sale made upon his mortgage, and it makes no difference whether the foreclosure was in a suit originally brought by him or upon a cross-complaint in which he prays for and obtains a foreclosure in a suit brought by another. And it makes no difference whether the junior mortgagee does or does not have a deficiency judgment entered in his favor."

F C. HACKMAN.*

[46] This deducible from rules 1 and 2, and cases cited in Notes 44 and 45.

[47] *Camp v. Land*, Note 45 *San Jose Water Co. v. Lyndon*, 124 Cal. 518, 57 Pac. 481 (1899) *Black v. Gerichten*, Note 44, and cases in Note 41, *Hershey v. Dennis*, 53 Cal. 77 (1878).

[48] *Black v. Gerichten*, Note 44.

*Of the Seattle bar.