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Defective Foreclosures of Real Estate

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DEFECTIVE FORECLOSURES OF REAL ESTATE

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FOR the past few years I have been more or less a regular member of that group of money-changers who gather on Tuesday mornings about 10:00 o'clock on the steps of our six million dollar Temple of Justice and listen to our Clerk and Recorder, who serves as Public Trustee without hope of additional compensation (see Lail vs. Denver, 88 Colo. 362, 297 Pac. 512) reading at considerable length—rather brief and extremely dry notices published in papers which the eye of man seldom sees and never reads—wherein and whereby somebody's dream of a little place all their own suddenly fades and is no more—for it has been foreclosed.

As I have stood there watching some old couple creep away after having heard some young bird like myself call out, "I bid three thousand dollars on behalf of the Last Chance Mortgage Company," I have often wished I could run down the long flight of steps after them and whisper in their ears—of course at the same time handing them my card—"I can set that sale aside, for the mortgage company forgot to dot the I in your name in the advertisement." I will admit I might be disbarred for soliciting business if I did it, but occasionally I am tempted to risk it.

On other occasions as I have waited my turn to bid I have been impressed by the number of individuals who apparently are acting as their own counsel, conducting their own foreclosures and depending entirely on their own knowledge to steer them through a proceeding in which the doctrine of "caveat emptor" is applied universally by the courts. Our own Court has announced this rule on several occasions. It will suffice to mention the cases of Lewis vs. Hamilton, 26 Colo. 263, 58 Pac. 196; Bent-Otero Imp. Co. vs. Whitehead, 25 Colo. 354, 54 Pac. 1023, and Stratton vs. Murray, 25 Colo. App. 395, 138 Pac. 1015.

The result is that the purchaser may be obtaining little or nothing, a faulty title is born, and praise be Allah, a lawyer must be employed.

Some years ago our office had a client who had considerable of this type of business who was in the habit of chiding

us about how easily we earned our fee on foreclosures. One day he went to the Court House, secured the necessary gratis forms, and had his own little sale without saying anything to us about it. Not long after the title came in for examination and we very quietly, gently, but firmly, pointed out no less than seven errors in the proceedings, with the result that we now advise at least one person on everything pertaining to the realm of the law.

As it is quite impossible to cover the entire field of foreclosures this noon even if I were familiar with it, and as I thought it would only be boring for me to try to read at length from a multitude of authorities pro and con, I concluded that I would merely sketch a few situations which might arise in any of our offices.

For this reason I have chosen to present this matter with the aid of a few characters, and in so doing I have, for the sake of clarity, referred to the borrower always as the mortgagor and the party loaning as the mortgagee, although the instrument involved might be a deed of trust and not a mortgage.

First, we have the man who loans the money.
Mr. Mortimer Gage, called by his friends "Mort" Gage.

Second, the chap who needs the money.
Ben Dunn.

Third, Gage's (the mortgagee's) lawyer.
M. I. Wise.

Fourth, Dunn's (the mortgagor's) lawyer.
R. E. Tainer.

These parts as well as the remaining members of the cast, including hundreds of dancing girls, soldiers, sailors, police and members of compliance boards, will be taken by myself. The off-stage effects, including the sounds from the discontented and restless mob, will be furnished by the audi-

ence. All scenes take place in Colorado, and the time is in the fourth year of the depression.

This touching episode is called "Don't put off until tomorrow what you can do today."

Our note signer has found himself once again familiar with the term "hard money" and so he is not surprised when he receives a little clipping from Uncle Sam notifying him to be present at a sale on one of the properties which Gage, the mortgagee, has requested the Public Trustee to hold on Tuesday, June 12th. If there is anything our friend Dunn, the mortgagor, has learned from his counselor it is to be present at the sale with a neutral witness or two and observe what goes on, and so he appears—but alas, neither Gage nor his lawyer are there, the Trustee is absent, and no sale is had. Dunn gallops into Tainer's office, tells his story and departs satisfied when the old lawyer tells him to forget it and he will look into it. A few days later the certificate of sale is recorded, showing the sale had been had at the time and place advertised.

"Something rotten in Denmark," mused Tainer, and after a little nosing around he finds that the mortgagee's lawyer, Wise, had requested the Public Trustee to let the sale go until he got back from a little fishing trip, but finding fishing better than the law practice, he wired the Trustee to go ahead and hold the sale at once, but to date it on the day advertised. The Trustee then held the sale on Wednesday, the day following the date on which it was set, and bid it in for a deficiency.

When the fish stopped biting for Wise and he returned to Denver he found that it had been he rather than the fish that had been hooked, for on his desk he found a copy of complaint, accompanied by a terse note from his client, stating that Dunn was seeking to set the sale aside.

Wise worried not, for he reasoned that nobody could prove that the sale had not been properly held unless the Trustee would admit his sworn statements were false, so the trial came on. The truth came out—the Judge read the case of Brown vs. Belles, 17 Colo. App. 529, 69 Pac. 275, and immediately granted the relief prayed for in the complaint.

As is the habit between counsel and client, they returned to Tainer's office after the decision and relived their sweet moments of victory, and if we were listening we might have heard the counselor telling his client as follows: "Well, you know, Dunn, this business of postponing sales is a mighty dangerous one. For example, the Supreme Court of North Carolina said in the case of Ferebee vs. Sawyer, 167 N. C. 199, 83 S. E. 17, L. R. A. 1915-B 640, 'Where a mortgage foreclosure sale is postponed or adjourned, a new and sufficient notice of the time and place for the sale must be published.'

"The Supreme Court of Massachusetts held in the case of Clark vs. Simons, 150 Mass. 357, 23 N. E. 108, that when a mortgage sale was adjourned for want of bidders from time to time, that the oral proclamation of the auctioneer was insufficient, and in an early Indiana case, Patten vs. Stewart, 26 Ind. 395, an oral notice of a sale which was adjourned by injunction was declared insufficient.

"As a matter of fact, as the Supreme Court of Virginia pointed out in a recent decision, Dickerson vs. McNulty, 142 Va. 559, 129 S. E. 242, 'whether the postponement must be for the same length of time as the original notice is a question upon which the authorities are in hopeless conflict.'

"Of course I don't know what our Court may decide, but I am sure that they will insist that reasonable notice of the postponement must be given and that probably such notice be published. A few states have gone so far as to insist that notice of the postponed sale be published for as long a period as was the original sale." See Griffin vs. Martin Co., 52 Ill. 130, and Glenn vs. Wooten, 3 Md. Ch. 514.

This next scene is called "The Period of Redemption," but it does not take place in any pawnshop.

Our friend, Gage, has foreclosed a trust deed on Dunn's home, dated before the 1929 act, lessening the redemption period from nine to approximately six months, and about seven months have gone by since the Public Trustee's sale. He is extremely anxious to get possession, as the Court has refused him a receivership, and so he strolls into Wise's office, asking him if he can get him possession at once. The latter,

excusing himself for a moment, rushes next door and looking through his fellow barrister's Compiled Laws and Courtright 1932 Supplement, comes back and says he knows he can, as the law says that the redemption period is six months, unless there are junior incumbrancers and judgment creditors who have signified their intention to redeem, and Gage assures him there are none. Wise, in order to show his client his real wisdom, then says, "Well, even if the old law applied, Dunn's time to redeem was done in six months and only judgment creditors then have any right to redeem. Sure, I'll get you possession for about—" well, whatever it was, Gage paid it.

Wise then serves the mortgagor, Dunn, with a notice demanding possession, and so Dunn hies himself to his old friend and counselor, R. E. Tainer, with his problem. The latter, who knows enough not to know too much too soon, says, "Well, he can't get you out without a Court order anyhow, so you come back the first of the week and we will see if we can figure out some way to keep you in."

The next week Dunn comes in worried sick, as he has been served with summons, but old Tainer says, "Don't worry, they haven't a leg to stand on. In the first place, you are not affected by the change in the redemption period, as the law considers as a part of the mortgage contract the statutes then in existence affecting the right and method of redemption therefrom, even though the mortgage does not recite the time allotted thereunder for redemption and does not refer to the statute in any way. The Courts have held so as recently as June, 1933, when the Supreme Court of North Dakota in the case of State ex rel. Cleveringa vs. Klein, 249 N. W. 118, said, 'The law fixing the period of redemption from a real estate mortgage foreclosure sale, existing at the time of the entering into a contract of mortgage * * * is a part of the contract of the mortgage, and any change in the law fixing the period of redemption—whether the law shortens the period of redemption or extends the period of redemption—is an impairment of the obligations of such contract.' If this case doesn't satisfy him, we will have him read Clark vs. Reyburn, 75 U. S. 354; Brine vs. Hartford

Fire Ins. Co., 96 U. S. 627, and Turk vs. Mayberry, 121 Pac. (Okla.) 665."

"Then again you don't need to worry, for being governed by the old law, our own Court has repeatedly held that the mortgagor, which is you, Dunn, has two valuable rights remaining after his time of six months for redeeming has expired and those are, first, the right to possession, and second, the right to have his judgment creditors redeem. I'll just call old Wise on the phone and ask him to read the cases of Farmers Assn. vs. Bank, 86 Colo. 293, 281 Pac. 366, and Lane vs. Morris, 77 Colo. 343, 237 Pac. 154.

"That ought to end it."

And so our friend, Dunn, lived happily in his house three months longer before the big, bad Gage got it.

The third scene is entitled, "A laborer is worthy of his hire, but a lawyer works for faith, hope and mostly charity."

"What about this business of attorney's fees?" Dunn one day asked his lawyer. "You know, I have noticed that Wise has been steadily raising the amount he charges as fees for supervising the foreclosures he is bringing against me, so that now they amount to a lot. As far as I can see, he has a comparatively easy job of it and I doubt that Gage pays him anything like the ten per cent or more that he is adding to the amount due for his services in connection with the sale."

"Maybe so," replied Tainer, "but that's a touchy subject to discuss with any lawyer, because if we say another chap's services are not worth much, he can say the same about ours. There are plenty of other folks who will say that lawyers' fees are too high without them admitting it—and the Courts themselves are equally slow to set aside fees because they know how difficult it is to place a value on a man's advice or to properly ascertain how much work may be involved in any case. One client demands but little, while another with a similar case wants to monopolize his lawyer's every waking moment.

"However these sales through the Public Trustee present a somewhat different situation than the ordinary case of an allowance of attorney's fees. Usually fees are passed on

by the Court and entered as a part of the decree, so that the debtor has the protection of knowing that the Court has satisfied itself that the fees claimed are bona fide, just, and reasonable, and of presenting to the Court any arguments he may have to have the fees set at an amount which he believes to be fair.

"No such protection is offered to him by the Public Trustee unless the latter is willing to embroil himself in arguments with the attorneys and the mortgagees.

"There are a few general rules, however, that the Courts have made which throw some light on this situation.

"To begin with, our Supreme Court in several cases, to-wit: Florence Co. vs. Hiawatha Co., 55 Colo. 378, 135 Pac. 454; Jones vs. Bank, 74 Colo. 140, 219 Pac. 780; Legge vs. Peterson, 85 Colo. 462, 277 Pac. 787, and Gertner vs. Bank, 82 Colo. 13, 257 Pac. 247, has laid down the doctrine 'That as an attorney's fee in a note is to protect and indemnify the holder and not to enrich him, he can recover only what he has paid or obligated himself to pay, and such payment or obligation must be actual, bona fide, and reasonable.'

"It would appear that even though you had agreed in the note and trust deed to pay a certain amount if there was a foreclosure that would not estop you from raising the question of fees. This was definitely established in this state by the Jones vs. Bank case.

"There are a few cases in other jurisdictions which show how far the Courts have gone to protect the debtor from unjust claims. The Wyoming Court in the case of Graves vs. Burch, 181 Pac. 354, refused to allow attorney's fees even though they were provided for in the mortgage where the mortgagor owing an overdue mortgage was lulled into inaction by the mortgagee, who told him not to worry about payment and then immediately assigned to a stranger, who started suit without demand; the mortgagor's tender of the amount due less attorney's fees was held sufficient.

"There is an interesting Michigan case found in 56 N. W. 931, called Baxter's Estate vs. Wilkinson, in which the Court held that where property was bid in by the mortgagee for the full amount due, including illegal attorney's fees, that

the amount of such fees should be treated as surplus and belonged to the owner of the equity of redemption; that as there was no redemption made the owner had the right to sue the mortgagee to recover such surplus at any time before his right of action was barred by the statute of limitations.

"In Minnesota the Court held in the case of Truesdale vs. Sidle, 67 N. W. 1004, that where the mortgagees foreclosed under a power of sale, including illegal attorney's fees, they had no right in equity to have the sale set aside and a new sale ordered but were liable to the mortgagor for the attorney's fees charged.

"Of course I know the next question in your mind, Dunn, and that is whether the chap whose house has been sold by the Public Trustee has a right to have the sale set aside if he can prove that illegal fees have been charged. That question cannot be directly answered except to say that if the Court construed it to be a fraud on his rights, then it would undoubtedly set it aside on the theory advanced in the case of Toll vs. McKenzie, et al., 88 Colo. 582, 299 Pac. 14, in which the Court said that where a mortgagee has engineered a constructive fraud in the sale, he can obtain no relief against the purchaser by foreclosure or otherwise until the wrong he perpetrated is undone, and those damaged made whole.

"If the Court would construe that by seeking illegal fees, the mortgagee had foreclosed for an amount in excess of that which was due, and if it followed the case of West vs. Bates, 70 Colo. 355, 201 Pac. 562, it would cancel the certificate of sale and enjoin the issuance of the trustee's deed.

"At any rate, Dunn, I am convinced that if our Public Trustee would demand receipts for the attorney's fees claimed in the foreclosures before allowing them, they would go a long way in insuring the bona fides of the fees claimed and would stop lay persons from including fees to which they were not entitled."

The fourth and last scene is called "If you don't at first foreclose, sue, sue again."

"Say, Tainer," asked his client, "do you remember the property that I sold a half interest in to my brother, in Canada, and on which Gage had a trust deed? Well, I just found

out that the Public Trustee issued his deed on it the last week although the redemption period is still not up. You know, I never received any notice of it although I am still living at the address given in the trust deed. My brother just wired me enough money to redeem the property. What can we do about it?"

"Sounds like we can do plenty," replied the old lawyer.

A few days later in popped Dunn again: "Say, you know I made that tender to the Public Trustee of the redemption money like you told me to but he refused to take it. Gage wouldn't take it either."

"Humph," growled his counselor, "guess the Trustee has been reading the Carlson vs. Howes case. Here, you read it for yourself, Dunn." And blowing the dust off of 69 Colo. he opened it at page 246 and handed it to his client.

"I don't understand this case, Mr. Tainer, because the Public Trustee told me this morning that he was going to issue another deed to Gage as soon as the redemption period has expired, and although this case holds he could not issue a redemption certificate to me, it also says he can't issue a second deed, as he has conveyed his interest in the property by his first deed."

"Well, Dunn, I'd say you understand the case pretty well for a fellow who is supposed to need my services to tell him what the cases mean. Guess I won't give you any more decisions to read or you will be scabbing on me by looking up the law for yourself. From what you say it looks like the Public Trustee and Gage are mighty friendly. Wonder what the reason is?"

"I can't tell you all the law just yet," replied Dunn, "But I can answer that one for you. Gage holds the mortgage on the Trustee's home and it falls due next month and the latter has to get the old boy to refinance it."

"Looks to me like the Trustee never read that case or is afraid to remember what it said," replied Tainer. "I'll tell you what we had better do. I don't like to get the Trustee involved in a lawsuit in which these facts would come out, as it might cost him his job. I think I will try and get Wise

to bring his client over and then the Trustee, you and I, will meet with them and see what we can work out."

Tainer phoned Wise and turning to his client said, "Well, Wise is willing to confer, but he says he is too busy to come over here and if we want to talk we will have to go to his office. Of course you know we all like to fight on our own grounds."

The scene now shifts to Wise's office. The weather, the depression, and the football results having been thoroughly discussed, the conversation turns to the business in hand.

"Well," said Wise, "why can't the Trustee issue a new deed? I'll admit I figured the period of redemption wrong."

Tainer then explained the Carlson case and also the earlier decision of Stephens vs. Clay, 17 Colo. 489, on which it was based.

Wise then grudgingly admitted:

"Guess you are right about that, but I'll just bring a quiet title suit. You know a beneficiary under a trust deed or the Trustee can do that in this state, don't you, Tainer? I just looked that up. You read the case of Munson vs. Marks, 52 Colo. 553, if you don't believe me."

"I believe you all right, Wise, but that is where he seeks to have adverse claim of some third party adjudicated like a claim under a void tax deed. Here you are trying to wipe out my client's equity of redemption by a quiet title suit and I don't think you can do it. Our Court of Appeals in Venner vs. Denver Union Water Co., 15 Appeals 495, refused to permit grantees of purchasers at a void foreclosure to maintain a suit to remove a cloud on title. In Stephens vs. Clay the purchaser at an irregular trustee's sale sought by quiet title suit to wipe out the interest of the owner of an undivided one-half interest in the premises. The Court refused the relief and suggested that the plaintiff should seek relief by judicial foreclosure and sale, or by other appropriate action. If anything, *we* have the right to bring an action to quiet the title against you under the doctrine of the Carlson vs. Howe case, and that is what we intend to do.

"You might look at the cases of Miller vs. Denver, 63

Colo. 385, and Ruedy vs. Alamosa Bank, 77 Colo. 112, and an annotation in 73 A. L. R. at page 612, which deal with defective foreclosures through Court if you want some ideas on the subject.

"Of course we might sue to set the sale aside under the authority of the cases of Brewer vs. Harrison, 27 Colo. 349, and Lathrop vs. Tracy, 24 Colo. 382," concluded Tainer.

After this barrage of these and other authorities which both lawyers pretended to know and which they wanted to read, the conference adjourned to meet the following day.

It is sufficient to say at this late hour that our friend Tainer's arguments won out. A settlement was reached and as we drop our curtain we find Gage and Dunn going down the elevator together, conversing as follows:

"Dunn, I have to admit you have a good lawyer. How do you pay him?"

"I don't, Gage, you do every time we settle. What I can't understand is why you hire Wise."

"Well, to tell you the truth, Dunn," replied Gage, "he is my son-in-law."

So this fable ends with the moral—

"One of the ways to acquire a law practice is to marry it."

WILL IT COME TO THIS?

Count that day lost whose slow-descending sun finds no lawyer sued for some lawsuit not won.