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Foreclosure by Sale by Public Trustee of Deeds of Trust in Colorado

Percy S. Morris

FORECLOSURE BY SALE BY PUBLIC TRUSTEE OF DEEDS OF TRUST IN COLORADO

By PERCY S. MORRIS *of the Denver Bar*

EVER since the inception of the conveying of real estate in Colorado deeds of trust have been in common use, a deed of trust, as herein mentioned, being an instrument which by its terms conveys real estate to a grantee, as trustee, as security for an indebtedness, with power given by the instrument to the trustee to sell the property at public sale upon certain notice in the event of default in the payment of the debt and to convey the property to the purchaser at such sale and apply the proceeds upon the indebtedness.

Until 1894 the deeds of trust executed in Colorado were to individuals as trustees and under their provisions the trustee was given the power to and did sell the property at public sale, after advertising the sale for a period specified in the deed of trust, and execute a Trustee's Deed conveying the property to the purchaser immediately upon the sale being held and the highest bid being accepted, there being no right of redemption from such sale.

In 1894 a statute was passed creating the office of Public Trustee in each county in the state and containing provisions regarding the method of the foreclosure by advertisement and sale by the Public Trustee of deeds of trust executed to the Public Trustee and providing the time and manner of redemption from such sale. Such statute further provided that from and after its passage all deeds of trust given to secure indebtedness of any kind shall name as trustee the Public Trustee and that any deed of trust that shall name any other person as trustee therein shall be deemed and taken to be a mortgage and foreclosed only as mortgages were then foreclosed in and through the Courts (1921 Colorado Compiled Laws secs. 5044 *et seq.;* 1935 Colorado Statutes Annotated, Chapter 40 Section 52, et seq.) This act was approved March 8, 1894, and became effective on that date.

Therefore all deeds of trust executed to private trustees prior to the passage of the 1894 act could be foreclosed by advertisement and sale by such private trustee without any right of redemption from the sale and this also is true even though the time of payment of the indebtedness secured thereby was extended after the passage of the 1894 act (Brewer vs. Harrison, 27 Colo. 349, 62 Pac. 224; Smissaert vs. The Prudential Insurance Co., 15 Colo. App. 442, 62 Pac. 967). And deeds of trust to private trustees executed after the passage of the 1894 Act could not be foreclosed by advertisement and sale by the Trustee but could be foreclosed only as mortgages by suit in Court.

But deeds of trust executed to the Public Trustee may be foreclosed as a mortgage by judicial proceedings (Neikirk vs. Boulder National Bank, 53 Colo. 350, 353, 127 Pac. 137) or they may be foreclosed by advertisement and sale by the Public Trustee without the necessity of any Court proceedings and without the expense, the delay and the necessity of securing service of Summons which would be required if the foreclosure had to be by a suit in Court.

The Colorado Statutes prescribe various successive acts and steps in the proceedings for foreclosure of a deed of trust to the Public Trustee by advertisement and sale by the Public Trustee from the time such proceedings are commenced until, by the execution and delivery of the Public Trustee's Deed, the foreclosure is completed. And the purpose of this article is to state and discuss the steps in such proceedings in their order so as to provide a guide in the handling of such proceedings and to be of assistance in guarding against the omission of some necessary step or the doing in an incorrect manner of any of the acts necessary to constitute a valid foreclosure. Much of what is contained herein may be considered elementary, but, if all of the steps in the foreclosure are to be outlined, it is necessary that much that is elementary be mentioned.

The Courts hold that the provisions of the deed of trust and statutes relating to the proceedings for the foreclosure by sale of the deed of trust must be strictly followed (41 C. J. 943; Stephens vs. Clay, 17 Colo. 489, 492, 30 Pac. 43; Lewis vs. Hamilton, 26 Colo. 263, 267, 58 Pac. 196; Keim

vs. Axelson, 74 Colo. 459, 461-462, 222 Pac. 651). In this connection it is to be borne in mind that this method of foreclosure is one which cuts out the interests of the owner and all subsequent grantees and encumbrancees without giving them their "day in court." And our Supreme Court has held that, once a private trustee has executed and delivered his Trustee's Deed, all of his powers in connection with the deed of trust and its foreclosure are exhausted even though the proceedings which he had taken in the foreclosure were defective and the interests of the maker of the deed of trust or his successors in interest were not cut out by them (Stephens vs. Clay, *supra;* Keim vs. Axelson, *supra*) and the same rule has been applied to the Public Trustee (Carlson vs. Howes, 69 Colo. 246, 247-248, 193 Pac. 490); but in a later decision the Supreme Court held that where the trustee gave a defective deed he could afterwards give a corrcted one (Brockman vs. DiGiacomo, 76 Colo. 428, 430-431, 232 Pac. 670). So that, if the foreclosure proceedings by the Public Trustee have not been properly conducted, it is questionable whether, after he has executed and delivered his Public Trustee's Deed, he can go back and correct any of the steps prior to the execution of his Public Trustee's Deed or whether he can start the foreclosure proceedings over. It will therefore be seen how important it is that each and every step in the proceedings to foreclosure by advertisement and sale a deed of trust be taken and followed with the utmost care and in strict compliance with the provisions of the statute.

The fact that the statute of limitations may have barred an action on the debt secured by the deed of trust will not bar a proceeding for foreclosure of the deed of trust by advertisement and sale (Holmquist vs. Gilbert, 41 Colo. 113, 92 Pac. 232; Foot vs. Burr, 41 Colo. 192, 92 Pac. 236; McClung vs. Graham, 45 Colo. 268, 269, 100 Pac. 411; Walters vs. Webster, 52 Colo. 549, 552, 123 Pac. 952).

Formerly, if the deed of trust constituted a lien or encumbrance upon property owned by decedent at the date of his death or secured an indebtedness constituting a claim against the estate of a deceased person, foreclosure by sale by the Public Trustee of such deed of trust could be had during

the year following the death of such person only by express permission of the Probate Court and without such permission the deed of trust could be foreclosed by sale by the Public Trustee only after the expiration of one year from the death of said person (Section 5344 1921 Colorado Compiled Laws; 1935 Colorado Statutes Annotated Chapter 176 Section 208); and the same statute by its terms applied to a deed of trust costituting a lien or encumbrance upon property owned by a mental incompetent at the date of the adjudication of his mental incompetency or which secures an indebtedness constituting a claim against the estate of a mental incompetent. However, a statute passed in 1931 (1931 Session Laws 793; '35 C. A. S. Ch. 40, secs. 65-68) has removed the restrictions contained in such statute insofar as they apply to deeds of trust constituting a lien or encumbrance upon property owned by a decedent at the time of his death or securing an indebtedness constituting a claim against the estate of a deceased person, leaving in force the provisions of the statute insofar as they relate to deeds of trust upon property owned by a mental incompetent at the time of his adjudication or securing indebtedness constituting a claim against the estate of a mental incompetent.

The first step in the foreclosure by advertisement and sale by the Public Trustee of a deed of trust is the presenting to the Public Trustee of the deed of trust to be foreclosed, the note or notes secured by it and a Notice of Election and Demand for Sale in which the holder of the indebtedness declares a violation of one or more of the covenants of the deed of trust and elects that the property therein described be advertised for sale; in view of the fact that the 1925 statute (1925 Session Laws 516, '35 C. A. S. Ch. 40, sec. 64) provides that upon receipt of such Notice of Election and Demand for Sale the Public Trustee shall securely paste it in a book to be kept by him for that purpose and shall cause a copy of it to be recorded in the Recorder's office, it is preferable that such Notice of Election and Demand for Sale be presented in duplicate, so that one of them can be recorded and the other pasted by the Public Trustee in the book kept by him for that purpose, although it would seem that, under the statute, if only one Notice of Election and Demand for Sale

is presented, the pasting of same in the book of the Public Trustee and the making of a copy of it and the recording of such copy will be sufficient.

After the presenting of the note or notes, the deed of trust and the Notice of Election and Demand for Sale, the next steps to be taken are, as above suggested, the pasting in the book kept by the Public Trustee for that purpose of one of the duplicates or the original of such Notice of Election and Demand for Sale and the recording in the Recorder's office of a duplicate or a copy of same.

Next comes the preparation of the Notice of Sale. This, ordinarily, consists of the filling in the blanks in the regular printed form and is not complicated although care should be used that it correctly names the parties to the deed of trust and correctly describes the deed of trust and the real estate covered by it, and correctly states all other matters called for by the printed form, and it states as the place where the sale will be held one which conforms with the place of sale stated in the deed of trust and that the date stated as the date of the sale is one which permits publication of the notice for the required period.

Almost all of the deeds of trust to the Public Trustee executed prior to the erection of the present City and County Building of the City and County of Denver stated the place where the sale should be held as the Tremont Street front door of the Court House in the City and County of Denver or on the premises. Such Court House has now been torn down and the new City and County Building is the present Court House of the City and County of Denver and to meet this situation there was passed a statute in 1933 which authorizes the sale under such deeds of trust to be conducted at the Bannock Street main entrance to the new City and County Building located on Civic Center in said City and County of Denver and which further authorizes the sale under any deed of trust to be conducted at any door, side or entrance of the new Court House in cases where, since the execution of the deed of trust, the Court House therein referred to has been destroyed or removed or the site thereof otherwise changed (1933 Session Laws 793-795; '35 C. A. S. Ch. 40, secs. 58-61).

Step number four is the publication of the Notice of Sale. The statute (Sec. 5051 1921 C. L., '35 C. A. S. Ch. 40 sec. 69) says that all deeds of trust shall prescribe a period of advertising notice of sale, weekly, in some newspaper of general circulation which publication shall not in any case be for less than four weeks. Of course the advertisement of the sale by the Public Trustee must be made for at least the period specified in the deed of trust. Most deeds of trust provide for four weeks' public notice of the time and place of the sale to be given by advertisement weekly in some newspaper of general circulation published in the County in which the real estate is situated, but the provision in the particular deed of trust regarding advertisement should be examined to make sure that it does not require a longer period of publication than four weeks and that it does not require publication more often than once a week. If publication is to be made four weeks, it must be borne in mind that publication in four successive weekly issues will not be sufficient but that the publication must be made at least once a week for five successive weeks, since the statute (1923 Session Laws 407, '35 C. A. S. Ch. 130 sec. 6, which is contained in the chapter relating to Printing, Advertisements and Newspapers) provides: "Where publication for four weeks is required, then publication once each week for five successive weeks in any daily, weekly, semi-weekly or tri-weekly newspaper shall be sufficient."

The fifth step is the one in which the greatest care must be used. More titles have been objected to because of defects occurring in this stage of the foreclosure than in any other stage of the proceedings. The step referred to is the mailing of copies of the Notice of Sale. Many persons whose title or interest in or lien upon the property is to be cut out by the foreclosure do not reside in the County where the property is located at the time of the publication of the notice or, if they do, they may not see the notice in the newspaper and, for this reason, our Legislature has provided that a printed copy of the Notice of Sale is to be mailed to each person whose title or interest is to be cut out by the foreclosure, if his address appears on the records.

The importance of the greatest care being used to follow the provisions of the statute in the mailing of the copies of the Notice of Sale cannot be emphasized too strongly because, as already stated, if the provisions of the statute in this regard are not strictly followed, the entire foreclosure proceeding may be rendered defective and all of the time and work put in the foreclosure proceeding and all of the expense gone for naught. The publication of the Notice of Sale and the mailing of such Notice are the very heart of the foreclosure proceeding and, just as the service of summons in a lawsuit is necessary to confer jurisdiction on the court to enter the judgment, so the publication and mailing of the Notice of Sale in strict compliance with the provisions of the statute are necessary to confer power on the Public Trustee to sell the property.

The latest statute on the mailing of the Notice of Sale was passed in 1925 (1925 Session Laws 516, '35 C. A. S. Ch. 40 sec. 64). It provides that the Public Trustee shall mail a printed copy of the Notice of Sale within ten days from the date of the first publication thereof to the grantor or grantors at the address given in the trust deed and that he shall also mail a like notice to each and every person who appears to have acquired a record interest in said real estate subsequent to the recording of said trust deed, whether by deed, mortgage, judgment or any other instrument of record; and that such notice shall be mailed to such person, or persons, at the address given in the recorded instrument of writing; also that if such recorded instrument of writing does not give such address it will not be necessary to mail any notice to the particular person or persons whose address is not so given, provided, however, that where only the county and state is given as the address of such person, or persons, then such printed notice shall be mailed to the county seat of such county, and provided further, that it will not be necessary to mail a copy of said printed notice to any person whose interest does not appear of record at the time said Notice of Election and Demand for Sale is recorded.

Let us examine in some detail the foregoing statutory provisions. First, as to the mailing of notice to the person or persons who executed the deed of trust which is being foreclosed. The deed of trust usually contains the address

of the person or persons who executed it and the notice should be mailed to each such person at his address so stated in the deed of trust. If the deed of trust, however, merely names him as of a certain county and state, then the notice should be mailed to him at the county seat of that county. For instance, if, instead of giving a more specific address, the deed of trust merely described John Jones, who was the maker of the trust deed, as being of the County of Arapahoe, in the State of Colorado, the notice should be mailed to John Jones, Littleton, Colorado, Littleton being the county seat of Arapahoe County.

In order that the Public Trustee may know the names of all persons who appear to have acquired a record interest in the property subsequent to the recording of the deed of trust which is being foreclosed, whether such record interest was acquired by deed, mortgage, judgment, mechanic's lien statement or any other instrument of record, either the abstract of title should be certified by an abstract company down to and including the recording of the Notice of Election and Demand for Sale or there should be furnished by an abstract company a supplemental abstract showing all instruments recorded affecting the property from the recording of the deed of trust which is being foreclosed to and including the recording of the Notice of Election and Demand for Sale or there should be secured from an abstract company a certificate showing the names of all persons who have acquired a record interest in the property by instruments recorded during such period and showing the book and page where each instrument was recorded by which such interest was acquired. A copy of the printed Notice of Sale should be mailed to each person who so acquired a record interest in the property subsequent to the recording of the deed of trust which is being foreclosed and such notice should be mailed to the address of each such person as such address appears in the recorded instrument by which each such person acquired his record interest in the property, that is the deed to such person, the mortgage to such person, the deed of trust securing a note payable to such person, the transcript of judgment in favor of such person, the mechanic's lien statement filed by such person or the instrument, of whatever character it may be, through which such person appears

to have a record interest in the property. If, as is often the case, such recorded instrument does not give any specific address of such person but merely describes him as being of a certain county and state, then the notice should be mailed to him at the county seat of that county in the same manner as already mentioned with reference to the maker of the deed of trust where his residence was described in the same manner.

Even though it may, as a matter of fact, be known that any of the persons to whom notice is to be mailed has moved from the address given in the deed of trust or other recorded instrument and even though his new and present address may be known, that does not do away with the necessity of mailing the notice to him at his address as given in the deed of trust or the recorded deed or other instrument through which he acquired his record interest. And even though there may be known the definite city or street or R.F.D. address of any such person to whom notice is to be mailed but whose address is stated in the deed of trust or other recorded instrument only by describing him as being of a certain county and state, that does not do away with the necessity of mailing the notice to him at the county seat of that county. The requirements of the statute must be complied with no matter what may be known as to his present address. The fact that the person to whom is mailed the notice addressed to him at his present address actually received the notice at such address, does not prevent the proceeding from being defective on its face because of failure to mail it to him at his address as given in the recorded instrument. The merchantability of a title depends on what the records show and not on what facts in favor of the validity of the title may be found to exist upon an investigation outside of the records. However, in any of such cases where the present address of any such person is known and is different from the address to which, under the terms of the statute, the notice is to be mailed, it would be well to mail the notice to him at his present address in addition to mailing a notice to him at the address given in the trust deed or other recorded instrument. It will only incur the extra expense of a postage stamp to do so and will be in the interest of fair play to give him actual notice of the sale. And, for the same reasons, it might be well, although perhaps

not necessary to the validity of the sale, to endeavor to secure the actual specific present address of each person to whom a copy of the notice is to be mailed in order that all may be done that can reasonably be done under the circumstances to get actual notice of the sale to each person whose interests are to be cut out by the foreclosure.

Of course, as is expressly provided by the statute, if the address of any person who acquired a subsequent record interest is not stated in any manner in any recorded instrument, no Notice of Sale need be mailed to him; however, if the actual present address of such person is known it would be well that a copy of the printed notice be mailed to him at that address in order that he may receive actual notice of the sale.

The statute which has been discussed containing the provisions for the mailing of the Notice of Sale was passed in 1925 and went into effect on June 26, 1925. The statute regarding this matter which existed up to that time was passed in 1894 and the provision which it contained regarding the mailing of Notice of Sale by the Public Trustee was as follows: "The Trustee shall mail a copy of the printed notice of sale so soon as the same shall be printed, to the grantor and all subsequent encumbrancers at the address given in the trust deed without extra charge." (Sec. 5050 1921 C. L.). And a provision in this language is contained in most of the deeds of trust executed prior to the taking effect of the new law and in fact many deeds of trust which have been executed since 1925 contained the same provision. There may be a question as to whether this provision, being contained in the deed of trust, was thereby made a part of the contract between the parties which could not be changed by the 1925 law and therefore whether, in foreclosing a deed of trust executed prior to June 26, 1925, or executed subsequent to that date and containing the same provision which was contained in the 1894 statute, the Notice of Sale should be mailed in the manner set out in such provision. It will be noted that this provision is that not only is the Notice of Sale to be mailed to the grantor at the address given in the trust deed but also that the notice must be mailed to all "subsequent encumbrancers" at the same address, to-wit: the address given in the trust deed; this means that the notice mailed to each

person who acquired a record interest in the property subsequent to the execution of the trust deed which is being foreclosed should be mailed to him at the address which the maker of the deed of trust stated in the trust deed as being his own address; it may sound foolish to mail a notice to someone who acquired a subsequent record interest in the property from the maker of the deed of trust by mailing such notice to such person who acquired the subsequent interest addressed to him at the address of the person from whom he acquired his interest, but this is the meaning of the old statute. Therefore, in the foreclosure of deeds of trust which were executed before June 26, 1925, or which, although executed after that date, nevertheless contained the provisions above mentioned which was contained in the old statute, it is best, in order to avoid any question on the matter, that both the old statute and the new one be complied with and that the notice mailed to each person who acquired a record interest in the property subsequent to the execution of the deed of trust should be mailed to him at the address given in the deed of trust as the address of the maker of the deed of trust and that another copy of the notice be mailed to him at his address as given in the recorded instrument by which he acquired his record interest in the property. It is better to mail out too many notices rather than too few; it can do no harm to mail too many but if a notice is not mailed to one person at an address to which it should be the proceeding may be rendered defective. It is better to be safe than sorry.

Under the 1925 law the notices are to be mailed within ten days after the first publication. Under the law which existed prior to 1925 the notices were to be mailed "so soon as the same shall be printed." Therefore, in the foreclosure of a deed of trust executed prior to June 26, 1925, or executed after that date and containing the provision that the notice of sale shall be mailed "so soon as the same shall be printed" it is advisable, in order to avoid any question on the matter, for the Public Trustee to mail out the notices immediately upon their being printed instead of waiting almost ten days after the first publication to do so.

It is suggested that in mailing notices addressed to persons at the same city or town as the one at which the notices

are mailed three cents in postage be affixed instead of only two cents. Two cents postage under the present law is sufficient to carry the letter to any address in the same city or town as the one at which it is mailed but it is not sufficient to carry it to any other postoffice. So that the extra one cent in postage should be affixed in order that, if the person to whom the notice is mailed has left the city or town to which the notice is addressed but has left a forwarding address, the notice can, without complications, be forwarded to him at his new address and also so that when a notice is mailed to a person merely at the county seat (because the county and state were the only address of him given in the recorded instrument) and the Postmaster knows his correct address in some other city or town the notice can be forwarded to him at his correct address without complication.

The Public Trustee should, after he has mailed the notices, make and sign a certificate of his having mailed the notices in which he states the name of each person to whom he mailed a printed copy of the notice of sale and the address of each person to which he mailed the same and the date he mailed the same and such certificate should be carefully preserved either by pasting it in the book or by keeping it in the file of that foreclosure. A printed copy of the notice of sale should be pasted in the same book in which the Notice of Election and Demand for Sale is pasted, preferably on the same page. The affidavit of the publisher of the newspaper showing the publication of the notice of sale should be furnished by such publisher to the Public Trustee and carefully preserved by the Public Trustee.

So much for the proceedings preliminary to the sale. Shortly before the sale is to be held there should be figured up the amount due and unpaid on the note or notes, principal and interest, and any amount due for taxes paid with interest thereon and the fees of the Public Trustee in the matter (which are fixed by 1933 Session Laws 789, '35 C. A. S. Ch. 40 sec. 56) and the expenses of the proceeding, including recording fees, abstract fees, publisher's charges, attorney's fees and other expenses, if any.

It is customary that the deed of trust contain a provision to the effect that if foreclosure be made by the Public Trustee

an attorney's fee in an amount specified in the deed of trust for services in the supervision of the foreclosure proceedings shall be allowed by the Public Trustee as a part of the costs of foreclosure. If the deed of trust being foreclosed contains such a provision and if the foreclosure proceedings are being supervised by an attorney on behalf of the holder of the note secured by said deed of trust and if such holder of the note has paid or agreed to pay the attorney a reasonable attorney's fee in an amount not in excess of that specified in the note or deed of trust, it is proper to include as a part of the expense of the foreclosure such attorney's fee. But the Supreme Court of Colorado has held that such provisions in a note or an instrument securing a note for the allowance of attorney's fees are to indemnify the creditor against the expenses incurred in the employing of an attorney and not to enrich the creditor (Florence O. and R. Co. vs. Hiawatha G. O. and R. Co., 55 Colo. 378, 382, 135 Pac. 454; Jones vs. First National Bank, 74 Colo. 140, 142, 219 Pac. 780; Denver L. & M. Co. vs. Capitol Life Ins. Co., 96 Colo. 21, 23, 39 Pac. (2d) 1036). Therefore if, as often is the case, the foreclosure proceedings are supervised only by the holder of the note or by his agent (who is not an attorney) or such proceedings are handled entirely by the Public Trustee without any supervision, so that, in any of such cases, they are not supervised by any attorney, then the Public Trustee must not include any attorney's fee as part of the expenses of the foreclosure, even though the deed of trust or note contains the said provision for an attorney's fee.

At the time and place named in the printed notice of sale as the time and place where the sale will be held the Public Trustee should read aloud the printed notice of sale and then call for bids. Almost invariably the only bidder at the sale is the holder of the indebtedness secured by the deed of trust and he usually bids an amount which may be less than but which is not greater than the amount which is secured by the trust deed plus the fees and expenses of the foreclosure. After it is found that no other bid is to be made the Public Trustee should strike off the property to the person making the only bid or the person making the highest bid, if there be more than one bidder, and the Public Trustee should then declare

that he has sold the property described in the notice of sale to that purson at the price which he bid, naming such price. The Public Trustee's fees and expenses of the sale are to be paid to him in cash immediately after he has declared the property to have been sold; if the successful bidder is the owner of the indebtedness secured by the deed of trust, the balance of the amount of his bid is to be applied upon the indebtedness secured by the trust deed. If the highest bidder is not the holder of the debt secured by the trust deed, the full amount of the bid must be paid in cash.

The decisions of the courts are in conflict as to the period during which notice of the adjournment or postponement of the sale by Public Trustee is to be published in cases where the sale is not held at the time stated in the original published notice of sale, but is postponed or adjourned (41 C. J. 966). The Courts of some states have held that where the sale is adjourned not only must there be oral announcement of the adjournment at the time and place stated in the original notice, but also the Notice of the Adjournment thereof must be published for the same length of time that is required for the publication of the original Notice of Sale (which, under the Colorado statutes, would be at least once a week for five successive weeks), but other Courts have held that this is not necessary provided the notice of the adjournment is such a notice as will give reasonable publicity and is given in good faith and contains all the requisites of a Notice of Sale. The Colorado appellate courts have not ruled upon this question and therefore it cannot be said which of the two conflicting rules the Colorado Supreme Court would adopt. Under these conditions the safe course to follow in the event that the sale is to be postponed or adjourned is for the Public Trustee to make, at the time and place of sale stated in the original published notice, oral announcement that the sale is adjourned to a certain hour and date (which will allow five weekly subsequent publications) at the same place and then have published at least once a week for five successive weeks the original notice of sale reading exactly as it read when it was previously published, together with and below same a notice signed by the Public Trustee stating the above sale has been

adjourned to and will be held at a certain time and place which are specified in detail in such notice of adjournment.

Upon making the sale the Public Trustee should enter in a book kept by him for that purpose a record of the name of the person or persons who executed the deed of trust, the date of the trust deed, a brief description of the property therein described, the date of sale, the name of the newspaper printing the notice of the sale, the name and last postoffice address of the purchaser at the sale and the amount at which the property was sold in separate parcels if so sold or en masse (1925 Session Laws 516; '35 C. A. S. Ch. 40 sec. 64).

The Public Trustee should then issue in duplicate a Certificate of Purchase. In doing this the customary printed form prepared for that purpose should be carefully filled in and then both copies of the Certificate of Purchase are signed by him. One of such duplicates should be plainly marked "Original" and the other should be marked "Duplicate." The original of the Certificate of Purchase should be delivered to the purchaser and within ten days from the sale the Public Trustee should file for record in the office of the Recorder the duplicate of the Certificate of Purchase and such duplicate should be returned to the Public Trustee by the Recorder after it has been recorded and should be preserved in his files (sec. 5052 1921 C. L.; '35 C. A. S. Ch. 40 sec. 70; 1931 Session Laws 698; '35 C. A. S. Ch. 40 sec. 168). The Certificate of Purchase should be carefully checked over before the original of it is delivered to the purchaser and the duplicate is recorded.

The statute, as it existed prior to 1931, provided that the Certificate of Purchase shall state the time when the purchaser shall be entitled to a deed to the property unless the same shall be redeemed (sec. 5052 1921 C. L.; '35 C. A. S. Ch. 40 sec. 70). However, in 1931 a new statute was passed (1931 Session Laws 698; '35 C. A. S. Ch. 40 sec. 168) which provides that the Certificate of Purchase shall state "that the purchaser shall be entitled to a deed of such lands and tenements at the expiration of the periods of redemption provided for by law unless the same shall be redeemed as provided for by law"; both the old and the new statutes also provide that the Certificate of Purchase shall describe the lands

and tenements purchased and the sum paid therefor; it is the practice, however, that other details concerning the deed of trust and the sale be stated in the Certificate of Purchase and this practice is a good one as it serves to identify the deed of trust under which the sale was had and to summarize the proceedings in connection with the sale.

Unless a redemption is made within the period provided by law, nothing further need be done until the expiration of the period of redemption. Upon the expiration of the period allowed by law for redemption from the sale, then, if no redemption shall have been made during such period, a Public Trustee's Deed is to be executed upon the surrender of the original of the Certificate of Purchase.

The law as it existed from 1894 to 1929 (secs. 5053-5057 1921 C. L.; '35 C. A. S. Ch. 40 secs. 71-75) allowed to the maker of the deed of trust and his assigns and holders of subsequent encumbrances six months after the sale in which to redeem and allowed judgment creditors of the owner of the property three months after the expiration of such six months in which to redeem, so that under that law the period of redemption did not expire until nine months after the sale and therefore, under that law, Public Trustee's Deed should not be issued until the expiration of such nine months. However, in Finch vs. Turner, 21 Colo. 287, 291, 40 Pac. 565, it was held that under that law a Sheriff's Deed upon a sale under execution may, as to the judgment debtor and his grantee, issue at any time after the expiration of six months and in McLaughlin vs. Wilson, 23 Colo. App. 59, 61-62, 127 Pac. 242 this ruling was followed in a similar case under the same law and the Court further held that, it not appearing from the record that any judgment creditor had made effort to redeem the land from the sale after the six months and within nine months therefrom, it will be presumed that no such redemption was attempted.

By a law passed in 1929 (1929 Session Laws 538) which took effect August 1, 1929, and an amendment thereto passed in 1931 (1931 Session Laws 696) such 1929 law and the 1931 amendments being secs. 158-168 Ch. 40 '35 C. A. S.) a change was made with respect to the period of redemption; the 1929 and 1931 laws give the owner of the property

the same six months from the date of the sale in which to redeem, and give the same period to a person who might be liable on a deficiency, but, as to redemption by persons having encumbrances or liens upon the property, they provide that such persons must, in order to redeem, file within the said period of six months from the sale with the officer who made the sale a notice of intention to redeem and that in case any such notice of intention to redeem is so filed within such six months the encumbrancee or lienor first in priority who shall have filed such notice of intention to redeem shall have ten days after the expiration of said six months in which to redeem and each subsequent encumbrancee or lienor in succession shall have a five-day period thereafter to redeem according to the priority of his lien or encumbrance. Therefore, in the case of a foreclosure of a deed of trust executed after August 1, 1929, a Public Trustee's Deed can be issued immediately after the expiration of six months from the sale if no redemption was made during such six months by the owner of the property or by a person who might be liable on a deficiency and if no encumbrancee or lienor has during such six months filed with the Public Trustee a notice of his intention to redeem.

As to the issuance of a Public Trustee's Deed on foreclosure of a deed of trust executed prior to August 1, 1929 (when the new redemption statute took effect) the situation is not as clear or definite. Although it has been held by the authorities already cited that, as against the judgment debtor or his grantees, a Sheriff's Deed of sale on execution is valid even under the old statute when it was issued after the expiration of six months and before the expiration of nine months from the date of the Sheriff's sale, the Supreme Court has held that under the old statute the owner of the property has the right to the possession of the property until the expiration of the nine months' period after the sale (Lane vs. Morris, 77 Colo. 343, 346, 237 Pac. 154; Carson vs. Bradford, 91 Colo. 434, 438, 15 Pac. (2d) 977) and the Supreme Court has said that, after the six-months period of redemption, there were still two valuable rights still available to the maker of the deed of trust, namely: possession of the premises until the deed of the Public Trustee was actually executed and the right to have the premises redeemed by a judgment creditor

of his (Farmers', etc. Association vs. San Luis State Bank, 86 Colo. 293, 302, 281 Pac. 366) and, because of these holdings, a number of attorneys are of the opinion that under the old law there might be considered to be a vested right in the owner of property who executed a deed of trust prior to August 1, 1929, to have the full nine months expire after the sale before his rights to the possession of the property are cut off and before the rights of his judgment creditors to redeem are cut off; and such attorneys are of the opinion that it might be held that such vested rights can not be affected or cut out by a law passed after the execution of the deed of trust and that therefore the provisions of the old statute as to redemption apply to sales made under deeds of trust executed before August 1, 1929, even though such sales are not made until after that date. Therefore to avoid any question on this point it is suggested that, in cases of foreclosures of deeds of trust which were executed before August 1, 1929, Public Trustee's Deed be not executed until after the expiration of the full period of nine months from the date of the sale.

In case the Certificate of Purchase has been assigned such assignment should be in writing signed by the purchaser upon the original of the certificate of purchase (sec. 5058 1921 C. L., '35 C. A. S. Ch. 40 sec. 76). While not absolutely necessary, it is advisable, in case the Certificate of Purchase has been assigned, to have the assignment on the original of the Certificate of Purchase acknowledged and to have such original of the Certificate of Purchase with the assignment thereon recorded in the office of the Recorder in order that the records of the Recorder and the abstract of title shall show such assignment. The Public Trustee should be advised of the assignment and he thereupon should make a note of it on his records.

After the expiration of the period of redemption provided by the law applicable to the sale without any redemption having been made, the Public Trustee is to execute and deliver Public Trustee's Deed (1929 Session Laws 541; '35 C. A. S. Ch. 40 sec. 164). Such deed can be prepared by carefully filling in the blanks in the customary form of Public Trustee's Deed and signing and acknowledging it. Care

should be taken to check it over and see that it is properly and accurately filled in and is properly signed and acknowledged. It is to be made to the holder of the Certificate of Purchase or to the lienor last redeeming in case a redemption has been made by a lienor.

In a number of decisions the Colorado Court of Appeals has said that, irrespective of whether or not the deed of trust contains a provision to that effect, the recitals in the Trustee's Deed are *prima facie* proof of the matters stated in them (see decisions cited in Scott vs. Lambert, 24 Colo. App. 260, 263-264, 132 Pac. 1145); in a later decision the Court of Appeals said that this rule is limited to recitals which it is a part of the duties of the officer to make and which are material to the execution of the trust (Page vs. Gillett, 26 Colo. App. 204, 205, 141 Pac. 866). Both the old statute (sec. 5052, 1921 C. L., '35 C. A. S. Ch. 40 sec. 70) and the 1931 statute (1931 Session Laws 698, '35 C. A. S. Ch. 40 sec. 168) provide that the Certificate of Purchase or a certified copy thereof shall be taken and deemed evidence of the facts therein contained. The Colorado Court of Appeals has held that a Trustee's Deed is invalid where it does not recite the making of request by the legal owner or holder of the note to have the trust deed foreclosed or the date on which the publication of the foreclosure notice was begun, how long the same was published or in what paper it appeared (Knox vs. Gibson, 23 Colo. App. 402, 403-405, 128 Pac. 470).

The Public Trustee's Deed should not be executed and delivered until there has been surrendered to the Public Trustee the original of the Certificate of Purchase; except that, if the holder of the Certificate of Purchase shall have lost the same, then, as provided by Section 5062 1921 C. L., '35 C. A. S. Ch. 40 sec. 80, he is to notify at once the Public Trustee of such loss and is also to give public notice in a newspaper of general circulation published in the county where the property described in the Certificate of Purchase is situated at least once a week for eight consecutive weeks and upon his having done so and upon his giving to the Public Trustee a bond in a sum double the amount of that named in the Certificate of Purchase, which bond is to be approved by the Public Trustee, the Public Trustee may issue a duplicate Certificate of Pur-

chase (which must bear upon its face the word "duplicate" in red ink) and such duplicate can be surrendered to the Public Trustee with the same effect as the surrender of the original when a redemption has been made and the redemption money is to be paid over or when Public Trustee's Deed is to be issued.

Under the Federal Revenue Law revenue stamps must be affixed to the Public Trustee's Deed in the amount of fifty cents of revenue stamps for each five hundred dollars or fraction of five hundred dollars of the amount for which the property was sold at the sale. These revenue stamps should be affixed by the Public Trustee to the deed and should be cancelled by him.

And the final step in the foreclosure is the filing of the Public Trustee's Deed for record with the Recorder of the County in which is located the real estate covered by the foreclosure.

NEW RULES FOR BAILIFFS

Don't Be Idiotic, Marshal Fahey Tells Courtroom Deputies in Outlining Their Duties.

With an eye to the maintenance of the proper decorum in the United States District Courtrooms, Marshal William B. Fahey has issued some pointed instructions to his deputies. They apply with equal force to bailiffs in all jurisdictions. The instructions follow:

"Strike the table with the gavel. Do not snap your fingers. That is idiotic. Do not peck on the table with a pencil.

"Maintain order and dignity. No one is permitted in the courtroom without a coat or smoking. No one shall be allowed to stand in the courtroom, especially not at the desk of the clerk, except some attorney making records.

"Bailiffs are supposed to be on their feet. One bailiff standing is worth twelve sitting down. Keep out of conversation at the door with spectators. This will not be tolerated.

"Let women alone in the courtroom. They will take care of themselves—in corridors, also. They do not need guardians; sometimes bailiffs do.

"Bailiffs are cautioned and warned not to comment on any case on trial or on testimony of any case on trial."

(From *Bench & Bar*, Kansas City, Mo., October, 1936.)