Denver Law Review

Volume 30 | Issue 3 Article 1

June 2021

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Recommended Citation
Frederic P. Storke & Don W. Sears, Statutory Redemption in Colorado, 30 Dicta 79 (1953).

STATUTORY REDEMPTION IN COLORADO

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Editor's note: This article represents one chapter from a book now being completed by the authors and to be published in the near future.

The statutory right of redemption is to be sharply distinguished from the equity of redemption. The latter is destroyed by the foreclosure sale,[26] which gives the purchaser an interest in the property free of this equitable right. The Colorado Redemption Act [27] gives certain rights to redeem *after* the sale. The equitable and statutory rights never run concurrently, the latter becoming effective at the instant when the former ceases to exist.

The statute provides for redemption by three classes of persons:[28] (1) owners; (2) persons liable on a deficiency; and (3) lienors. The manner of redemption by each class and its legal effect is stated in the act. A period of six months, running from the date of the foreclosure sale, is set up.[29] We will call this "the standard redemption period." The owner of the property at the time of the redemption may redeem within this standard period. No order of redemption is specified during this time, so that either the owner or other persons liable may redeem without waiting for the other.

Lienors, whose liens are subsequent to the foreclosed mortgage, may redeem after the expiration of the standard period.[30] In order to have this right, a lienor must take two steps during the standard period. He must record his lien (unless it is already of record), and he must file a notice of intent to redeem with the officer making the sale (usually the Public Trustee or Sheriff).[31] If no notices are filed, the rights to redeem of all parties terminate at the end of the standard period, and the purchaser is entitled to a deed.

If one or more lienors, having recorded liens, duly file notices, they have a right to redeem according to their priority.[32] The "senior" lienor, that is, the one whose lien ranks next after the foreclosed mortgage, is given a ten day period immediately following the close of the standard redemption period, in which he may redeem. Each subsequent lienor has five days in the order of priority.

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[26] Fisk v. Cathcart, 3 Colo. App. 374, 33 Pac. 1004 (1893).

[27] COLO. STAT. ANN., c. 40, Art. 4 (1935).

[28] *Id.* § 158.

[29] *Ibid.*

[30] *Id.* § 159.

[31] *Ibid.* The annotation to this section erroneously states that the lien must be of record and the notice filed *thirty days* before the expiration of the six-month period. This statement is based on an article by Ira Quiat, VI DICTA 18 (1929), written while the bill was pending. Apparently the thirty-day provision was omitted from the act as finally passed.

[32] COLO. STAT. ANN., c. 40, § 159 (1935).

The existence of the statutory right of redemption makes it necessary for the purchaser at the foreclosure sale to check carefully before he receives his deed. A prematurely issued deed is void, and there are difficulties in correcting such a mistake. The purchaser must first inquire of the Public Trustee or Sheriff whether any notices of intent to redeem have been filed. If there are none, he calculates six months from the sale and adds one day, which gives him the earliest date at which a deed may be issued. If notices of intent have been filed, he multiplies the number of such notices by five, adds five days to this, plus the six months standard period, finally adding one more day to the total.

The operation of the Redemption Act is strictly limited to real estate security transactions.[33] There is no provision in our statutes for redemption after a foreclosure sale of personal property. The Act applies to sales "by virtue of any mortgage, trust deed or other lien" and also to execution sales. Whether there is a right to redeem after a foreclosure sale under an executory land contract depends on the interpretation of the word "lien". The Colorado courts have described the security interest of the seller in a land contract as a "vendor's lien".

METHOD OF REDEMPTION

We have seen that a person exercising the *equitable* right to redeem must pay the *full amount* of the mortgage debt. This is not true of redemption under the statute. The person redeeming (unless there has been a previous redemption) need pay only the *amount for which the property is sold,* plus interest and certain other charges.[34] This is a vitally important feature of the whole scheme, as will be shown in detail later. It is customary to say the person redeeming must pay the "amount of the certificate." This refers to the *certificate of purchase* executed by the officer conducting the sale, which states the amount for which the property was sold.[35] Payment of the amount required to redeem is made to such officer, who then issues a *certificate of redemption* [36] to the person entitled thereto. This certificate must be recorded. If there is no further redemption, the holder of the certificate will be entitled to a deed.

It will be noted that the owner and a party redeeming because of a deficiency liability are treated alike both as to the time within which they may redeem and the method and amount paid. The first lienor to redeem, although he does so within a different period, pays the same amount and follows the same method of payment. The *effect* of redemption by these different persons is not at all the same. This will be discussed in detail later.

Successive redemptions are possible whenever one lienor has redeemed and other lienors, junior to him, have filed notices of

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[33] *Id.* § 158.
[34] *Ibid.*
[35] *Id.* § 168.
[36] *Id.* § 160.

intent to redeem.[37] In this case, the second redemptioner does not merely pay the amount of the certificate, with interest and charges. He must add the full amount of the lien of the person from whom he redeems. If this were not the case, the first redemptioner would lose all claim to the property and merely get back what he had paid to redeem, a clearly unjust result.[38] The net effect would be to give the property to the last redemptioner instead of to the first, thus destroying the senior lienor's priority.

Let us now consider a hypothetical case involving typical successive redemptions, which we will call Illustration I. D mortgaged property to C_1 and C_2 successively for $10,000 and $5,000 respectively, both mortgages being duly recorded. C_3 and C_4 recovered judgments for $1,000 and $500 respectively, in that order, and filed transcripts thereof. The first mortgage was foreclosed and at the sale held February 15, 1952, C_1 bid in the property for $6,000 and received a Sheriff's certificate of purchase, which he recorded. D made no attempt to redeem, C_2, C_3 and C_4 all filed notices of intent to redeem with the Sheriff during the standard redemption period which expired August 15, 1952. On August 16th, C_2 redeemed by paying $6,000 to the Sheriff, who issued the certificate of redemption to C_2 (in all illustrations, amounts paid for interest and other charges are omitted for the sake of simplicity; the reader must bear in mind that in an actual case these amounts must be added). C_3 wished to redeem immediately, but was advised by his lawyer that he could not do so until August 26th. The redemption period fixed for C_3 begins on August 26th and ends on August 30th, and is not accelerated by the fact that C_2 redeemed early in his own period.[39] Accordingly, C_3 redeemed on August 26th by paying $11,000 to the Sheriff, being the amount paid by C_2 plus the amount of C_2's own lien. On September 4th, the last day of his own redemption period, C_4 redeemed by paying $12,000 to the Sheriff. This is the amount paid by C_3 plus the amount of C_3's lien. On September 5th, C_4 demanded a deed to the premises. Since all periods of redemption had now expired, the Sheriff delivered the deed to C_4. The latter now holds title to the land free and clear of the claim of D, C_1, C_2, and C_3. It should be noted that C_4 has paid twice as much for the land as C_1 bid at the foreclosure sale. He would not have paid this amount if he did not feel that the land was worth more than $12,000.

It will be observed that C_1 made a mistake by bidding only $6,000 when the property was worth $12,000 and his own claim was for $10,000. In consequence of the redemption, he has so far

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[37] *Id.* § 159.

[38] This unfair result was actually produced by the statute as originally passed. Colo. Laws 1929, c. 151, § 2, permitted the second redemptioner to redeem by paying the amount paid by the first redemptioner. This mistake was discovered and corrected by Colo. Laws 1931, c. 140, § 1, requiring the later redemptioner to pay the amount of the lien held by the person from whom he redeemed.

[39] COLO. STAT. ANN., c. 40, § 159 (1935).

collected only $6,000. It is true that he can recover a deficiency judgment against D for the remaining $4,000, but this may prove to be uncollectible. If he had been foresighted, he would have bid the full amount of his claim, provided that he felt that the property was worth that much to him. Then the redemption would have left him with his debt paid in full and if there were no redemption, he would have property of at least equivalent value. This brings out one of the basic policies of the Redemption Act. The very existence of the possibility of redemption brings pressure on the foreclosing mortgagee to bid the reasonable value of the property.[40]

REVIVAL OF LIENS

When the property is sold in foreclosure, all liens junior to the foreclosed mortgage are cut off, provided that the holders are duly joined and served. What happens to these liens in the event of redemption following the sale? There is a widespread doctrine that at least some of these liens revive as a result of the redemption. There is a very plausible argument for this result. The redemption statutes in most states provide that redemption shall annul the sale.[41] Since it is the sale which destroys the liens, it quite naturally follows that annulment of the sale will restore the liens. Many of the cases rely on this simple doctrinal interpretation without consideration of the soundness of the result reached by holding that the liens revive.

Revival of liens has been called "a trap for the unwary." [42] Suppose that Illustration I occurred in a state where all liens revived on redemption. It would be quite unwise for D to redeem. While he could get his property back on payment of $6,000, the lien of the foreclosed mortgage would revive as security for the balance of $4,000. The mortgagee could foreclose all over again to collect this balance. As we shall see later, the present Colorado statute prevents this result.

Revival of liens must not be confused with the accrual of a lien *de novo*.[43] Suppose Illustration I occurred in a state where the lien of the foreclosed mortgage did not revive on redemption. The mortgagee could secure a deficiency judgment and file a transcript, thus securing a new lien on the redeemed land. So far as D is concerned, he is no better off than if the lien actually revived. There is an important difference, however, when the owner of the premises at the time of foreclosure is a non-assuming grantee, G. In a state where liens revive, the land in the hands of G is subject to the mortgage. However, the filing of a transcript of the deficiency judgment against D does not result in a lien against

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[40] Durfee and Doddridge, *Redemption from Foreclosure Sale*, 23 MICH. L. REV. 825 (1925); Note, 5 U. OF CHI. L. REV. 624 (1937).

[41] See, for example, COLO. STAT. ANN., c. 40, § 72 (1935), "the said sale and the certificate thereupon granted shall become null and void."

[42] Durfee and Doddridge, note 40 *supra*.

[43] OSBORNE ON MORTGAGES, § 309 (1951).

the land of G. Consequently in a state where liens do not revive, G gets the property completely free from any claim of C for the deficiency.

Like most other states having redemption statutes, Colorado has adopted the doctrine of revival of liens. This is true both under the present statute, passed in 1929, and predecessor statutes. The decisions under the earlier law were contradictory and there was an attempt to clarify the law in the 1929 Act. This lays down specific rules on the subject, in contrast to the older statutes which merely provided that the sale should be annulled by redemption, with no mention of revival of liens.

EFFECT OF REDEMPTION BY ORDER

When the owner of mortgaged premises redeems from a foreclosure sale, the result is to annul the sale and leave the premises subject to all liens except the lien of the foreclosed mortgage, which is discharged by the sale.[44] In other words, the redeeming owner gets his property back subject to the junior liens which would have been cut off if there had been no redemption. In Illustration I, the lien of C_1 does not revive as security for the $4,000 still due on his mortgage, but the liens held by C_2, C_3, and C_4 all revive upon redemption. It does the owner very little good to redeem unless he is in a position to pay off the junior liens.

Only one case involving the effect of redemption by the owner under the present law has been found. In *Home Owners' Loan Corporation v. Meyer*,[45] there was no actual redemption but the court treated the case as if the owner had redeemed, because of an estoppel against the foreclosing creditor. The Loan Corporation, C_1, foreclosed a deed of trust on property owned by Lippis (D), bid in the land and received a certificate of purchase from the Public Trustee. Meyer (C_2) held a junior judgment, with a duly recorded transcript, which was cut off by the sale. C_1 decided to give D a further opportunity to pay off the loan. After expiration of the redemption period, C_1 should have applied to the Public Trustee for a deed, conveyed the property to D, and taken back a new deed of trust. This would have completely eliminated C_2, who had failed to redeem. Instead, C_1 *assigned* his certificate of purchase to D, who presented it to the Public Trustee and asked for a *certificate of redemption*, which was given to him. Observe that D, as holder of the certificate of purchase, was entitled to a Public Trustee's *deed*, and if this had been issued all would have been well. D gave C_1 a new deed of trust, which was later foreclosed, and C_1 once more acquired the property. But C_2 now claimed that his junior lien was revived by the "redemption" again the land now owned by C_1. This position was upheld by the court. C_1, having acquiesced in the issuance of the certificate

[44] COLO. STAT. ANN., c. 40, § 161 (1935).
[45] 110 Colo. 501, 136 P. 2d 282 (1943); Storke, *A Decade of Colorado Law*, 23 ROCKY MT. L. REV. 247 (1951).

of redemption to D, was estopped to claim that there had been no redemption in fact.

The case is an object lesson in foreclosure procedure. The foreclosing creditor should follow the method prescribed by the statute without attempting to invent short-cuts. It is clear that no one should attempt foreclosure without a thorough study of the Colorado Redemption Act.

Although the lien of the foreclosing mortgagee is not revived under the present statute, he may recover a deficiency judgment and file a transcript. The words of the statute "lien of the foreclosed mortgage, which is discharged by the sale" do not mean that the mortgage *debt* is discharged, but merely the *lien*. Any other interpretation would do violence to the well established right to a deficiency judgment. That the foreclosing mortgagee, on following this procedure, will acquire a lien *de novo* on the property of the owner who redeems is clearly indicated by the case of *Twogood v. Ocsay*.[46]

In the *Twogood* case, C_1, one of several mechanic's lienors holding liens of equal priority, foreclosed and the other lienors intervened. The property was purchased by Twogood (P), for $825. This sum was pro-rated among the lienors whose claims totalled $2,500. As the owner, Cauley (D), was personally liable for the debts secured by mechanic's liens, deficiency judgments were entered against him in favor of the lienors. One of these, Gratke (C_2), filed a transcript of his deficiency judgment and assigned it to Ocsay (C_2X), who filed a notice of intent to redeem with the Sheriff and tendered the necessary amount within the ten-day period following the close of the standard redemption period. P sued to enjoin this redemption, but the court held for C_2X. P argued that the lien of C_2X was not "subsequent" to the foreclosed lien of C_1, hence C_2X had no right to redeem. The court pointed out that C_2X was not redeeming by virtue of the *mechanic's* lien, which was discharged by the sale, but by virtue of the *judgment* lien, which accrued when the transcript was filed and was therefore *subsequent* to the foreclosed lien. During the redemption period, D still had an interest in the property. The lien of the deficiency judgment attached to this interest, so that C_2X was entitled to redeem. The implications of this decision are tremendous, and will be further considered in the discussion of the effect of redemption by lienors. For our present purpose, the important point is that any person holding a deficiency judgment may acquire a lien *de novo* by filing the transcript.

Effect of Redemption Because of a Deficiency

The clause of the statute just discussed provides for redemption by the *"owner"*, not by the *"mortgagor"*. When the original mortgagor transfers all his interest, he cannot redeem as "owner". If he is still personally liable, however, he may redeem by virtue

[46] 97 Colo. 300, 48 P. 2d 1119 (1935).

of the clause in the statute, permitting redemption by "any person who might be liable upon a deficiency." [47]

When D, after mortgaging property to C to secure his own debt, transfers all his interest to G, G is entitled to redeem as owner and D as a person liable for the deficiency. If G has assumed the debt and makes a further transfer to GG, GG can redeem as owner, D and G as parties subject to a deficiency liability. But if G did not assume in this last situation, he has no right to redeem at all. He is not the owner and is not liable for any deficiency.

The clause permitting redemption because of a liability for a deficiency is not common in redemption statutes. It did not appear in our legislation before 1929. No case involving the operation of the clause has come before our Supreme Court. What is the object of such a provision, and how does it work in practice?

The clause permitting redemption by the owner is based on a policy of ownership protection, giving the owner an extra six months to occupy his home and attempt to refinance the loan. The object of permitting redemption by a person liable on a deficiency is quite different. It is based on the fact that such a person is usually a surety for the owner. It forms part of a general policy of suretyship protection. Its effect is to enlarge a surety's *right of subrogation.*

The effect of this type of redemption is to make the person redeeming "the owner of the *lien* redeemed from, to the full extent thereof including all extra costs and expenses paid by such redemptioner, who shall nevertheless be still liable for such deficiency." [48] Notice, it is the *lien,* not the *property,* of which the redemptioner becomes the owner. As the redemption annuls the sale, the owner is benefited. He is no longer in danger of losing his property at the expiration of the redemption period. However, his land is subject to the lien now held by the redemptioner. The latter may foreclose if this lien remains unpaid.

Let us consider a typical suretyship situation, Illustration II. D borrows $10,000 from C, giving his note for the debt, which is endorsed by S for D's accommodation. D also gives C a mortgage as further security. When the debt falls due, and at any time before a foreclosure sale, S may pay it and will then be *subrogated* [49] to the note and mortgage. This puts S in the same position as if C had assigned the note and mortgage to S. As between D and S, the former should have paid the debt. When S paid, he acquired a right of *reimbursement* [50] against D, that is, a personal right of action to recover the amount paid. The right of subrogation gives him a security interest in D's land designed to make the right of reimbursement more effective.

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[47] COLO. STAT. ANN., c. 40, § 158 (1935).

[48] *Id.* § 161.

[49] Watts v. Bock, 80 Colo. 223, 249 Pac. 1095 (1926); RESTATEMENT, RESTITUTION, § 162 (1937); OSBORNE ON MORTGAGES, § 278 (1951).

[50] Cave v. Belisle, 117 Colo. 180, 184 P. 2d 869 (1947); RESTATEMENT, SECURITY § 104 (1941).

S's right to pay the debt would be terminated by the foreclosure sale if it were not for the provisions of the Redemption Act. The Act gives him an additional six months to exercise this right, on somewhat modified terms. When C forecloses and bids in the property for the full amount of his claim, S has no right to redeem. His liability for the deficiency is at an end. But if C bids only $8,000 and receives a certificate of purchase, S may redeem regardless of any actual judgment for the deficiency. Although S owes C $10,000 plus, he may redeem by paying $8,000 with interest from the date of the certificate. He is still personally liable to C for the balance of $2,000 plus, as expressly provided in the Act.[51]

The usual equitable right of subrogation does not arise until the surety pays the debt in full. The statutory right given by the Redemption Act requires only the payment of the amount paid at the sale, plus charges. It is clear that S may foreclose for this amount, but not for the additional amount of the deficiency, if he has not actually paid this. If he does pay the deficiency before foreclosing, may he add this amount to his lien? While the statute does not make this clear, he should have a right to do so on the basis of the underlying ideas of subrogation.

Suretyship relationships are not confined to accommodation loans like the foregoing illustration. They arise out of almost every transfer of mortgaged property. Particularly, where the owner of mortgaged property sells it to a grantee who assumes the mortgage, the grantee becomes the principal debtor and the grantor-mortgagor a surety. This relationship is definitely recognized by the courts.[52] It is based on the fact that the grantee has received credit for the amount of the mortgage as a deduction from the purchase price, and both parties clearly contemplate that he should pay the mortgage debt. If he fails to pay it, and there is a foreclosure and a deficiency, the mortgagor is in the same position as S was in Illustration II, above. He is a party liable for the deficiency and has a right to redeem and be subrogated to the mortgage. He also has a personal right of reimbursement against the grantee.

The right of the mortgagor to redeem and be subrogated exists even if the grantee does not assume, provided that the amount of the mortgage has been deducted from the purchase price. In this case the mortgagor has no right of reimbursement, since the grantee is not personally liable. It may seem strange that a suretyship relationship should exist here, where only one person is liable for the debt. The courts have worked out a doctrine that the land is the primary fund for the payment of the mortgage debt. Sometimes they appear to personify the land as the principal debtor in order to emphasize that the mortgagor is a surety. This treatment is necessary to prevent the unfair wind-

[51] COLO. STAT. ANN., c. 40, § 161 (1935).

[52] Note 50 *supra;* RESTATEMENT, SECURITY, § 83(c), comment *e* (1941).

fall which would result to the grantee if he were allowed to keep the land while the mortgagor paid the debt. The net result is that the mortgagor is a party entitled to redeem because of his deficiency liability, and becomes the owner of the lien upon redemption.

How does the statute apply when a person liable on a deficiency is in no sense a surety? This possibility will be indicated in a hypothetical case, Illustration III. D owned property which he valued at $15,000, and which he mortgaged to C for $10,000. He sold it to G, who paid him the entire $15,000, relying on D's promise that he would pay off the $10,000 mortgage when it fell due. D failed to make this payment, C foreclosed and bid in the property at the sale for $8,000. D was then a party liable for a deficiency. He redeemed by paying $8,000 to C, and claimed to be the owner of the mortgage with the right to foreclose it against G.

Although a literal application of the statute would seem to sustain D's position, it is quite certain that the courts would deny the foreclosure action. Probably G's best defense would be to counterclaim for $10,000, the loss resulting from the failure of D to discharge the mortgage debt as he had promised to do. He should also ask for cancellation of the mortgage. This procedure enables the court to reach the equitable result without doing violence to the wording of the statute. Conceding that D has become the owner of the mortgage, he has no right to foreclose it because nothing is due him thereon after a proper adjustment of the claims of the parties. Another way to state this result is to say that D's ownership of the mortgage is based on his right of subrogation and this does not exist because D is not a surety.[53] He has merely paid his own debt, for which he is primarily liable by the terms of his arrangement with G and the payment by the latter of the full purchase price. G is a "property surety,"[54] one whose land is secondarily liable for the debt of another.

In the foregoing illustration, D expressly promised G to discharge the mortgage. Even if he made no such promise, the result is exactly the same. G has an equity that D shall pay the mortgage based on G's payment of the full purchase price without deducting the mortgage debt. The law imposes a duty on D to discharge the mortgage regardless of any promise.

Effect of Redemption by Lienor

One purpose of giving lienors a right to redeem is to make any surplus value in the mortgaged property available to others having liens thereon.[55] Another purpose, not clearly apparent from the statute itself, is to bring pressure on the foreclosing mortgagee to bid a fair amount for the property. In Illustration I, above, D bid only $6,000 for property which was worth much more. If he had realized that he would lose the land because of

[53] Osborne on Mortgages, § 278 (1951)
[54] Restatement, Security, § 83(b), comment *c* (1941).
[55] Stevenson v. Sebring, 63 Colo. 4, 164 Pac. 308 (1917).

the redemption by a lienor, he would probably have bid the full amount of his claim. There seems to be fairly general recognition of this fact by banks and other institutional lenders, so that it is quite a standard practice to bid the full amount of the mortgage debt, when the land is fairly worth that amount.

The statute[56] provides that when redemption is made by a lienor, his certificate of redemption operates as an assignment to him of the estate and interest acquired by the purchaser at the sale, subject however, to the rights of persons who may be entitled subsequently to redeem. As the purchaser at the sale acquires the property free and clear of all junior liens, this should be equally true of the redemptioner. In this provision there is no statement that the sale is annulled. This indicates that there will be no revival of liens when a lienor redeems. This is very important, as there was case authority prior to 1929 indicating that an intermediate lien revived when a subsequent lienor redeemed.[57]

We have seen that when the foreclosing mortgagee becomes the purchaser at the sale, he may lose the land to a redeeming lienor while part of the debt remains unpaid. This cannot happen to a redeeming lienor. The latter either keeps the land permanently, or loses it to another redemptioner with the compensation of having his own claim paid *in full.* It is the obvious intent of the statute that the last redemptioner should keep the land, regardless of whether it is worth the amount secured by his lien, a fraction of this amount or many times the amount. The court so held in *Bailey v. Erny,*[58] interpreting a predecessor statute. The purchaser at the foreclosure sale tried to prevent a judgment creditor of the mortgagee from redeeming by paying him the amount of his judgment. The court held that he had no such right, and awarded the land to the redeeming judgment creditor.

The rule of *Bailey v. Erny* gave the last redemptioner an absolute right to the land. This rule was severely limited in *Plute v. Schick,*[59] which held that under certain circumstances the purchaser at the foreclosure could retain the land by paying off the claim of the lienor desiring to redeem. This is a very unfortunate decision,[60] which not only contradicts the letter of the statute, but seriously undermines its basic policy. Permitting junior lienors to redeem penalizes underbidding by the foreclosing mortgagee. If he can escape the penalty by paying off the lienor, there is far less incentive for him to bid a fair amount at the sale. In order to discourage underbidding, provisions penalizing it should be strictly enforced even if this occasionally gives the redeeming lienor an undeserved windfall.

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[56] COLO. STAT. ANN., c. 40, § 161 (1935).

[57] Stryker v. Dunn, 72 Colo. 45, 209 Pac. 644 (1922). But see Harrington v. Anderson, 87 Colo. 417, 288 Pac. 1049 (1930), reaching a contrary result without discussion of Stryker v. Dunn.

[58] 68 Colo. 211, 189 Pac. 18 (1920).

[59] 101 Colo. 159, 71 P. 2d 802 (1937).

[60] Case note, 12 ROCKY MT. L. REV. 58 (1939).

In this case Schick (C_1) held two deeds of trust on a house, one given by Kist (D) and the other by his grantee, Baxter (G). C_1 foreclosed and bid in the property for $1,244.78. He also procured a quitclaim deed from G, went into possession and made improvements. Plute (C_2X), discovering a judgment for $52.50 outstanding against the property in favor of Connor (C_2), procured an assignment of this judgment. He filed notice of intent to redeem on the last day of the standard redemption period, and within the following ten days tendered the amount necessary to redeem to the Public Trustee. The Trustee had issued a deed to C_1 on the last day of the standard period. This was clearly premature, even if no notice of intent to redeem had been filed, so the Trustee withdrew the deed. C_1 now paid the amount due on the judgment to the clerk of the court in which it had been recovered, claiming this cut off C_2X's right to redeem. C_2X brought an action to compel the Public Trustee to issue a deed to him, joining C_1 as a defendant. The court denied any relief to C_2X and indicated that the Public Trustee could properly issue a deed to C_1.

It is notorious that hard cases make bad law. Courts have always had trouble in deciding which of two innocent parties should bear a loss caused by the wrongful conduct of another. In *Plute v. Schick* they faced the problem of determining which of two undeserving parties should get a windfall. They solved it by taking the property away from the party who would otherwise get the biggest windfall, and whose conduct seemed to the court to be most reprehensible. C_2X had borrowed the abstract from C_1 as a prospective purchaser, discovered the outstanding judgment and bought it up in order to get the land for a song. However, C_1 had violated two of the principles which the statute is designed to promote. He had bid in the property cheaply at the sale and should have been penalized for underbidding. He had taken possession during the redemption period, though the statute is designed to prevent this. The conditional and inchoate nature of the interest held under a certificate of purchase is sufficient warning to the purchaser not to make improvements before he secures a deed. Such improvements are made at his peril and should create no equity against redemption. The court purported to apply the spirit of the statute as against its letter, but completely failed to comprehend its underlying purpose.

FORECLOSING MORTGAGEE AS SUBSEQUENT LIENOR

In *Twogood v. Ocsay*,[61] a creditor redeemed by virtue of a deficiency judgment recovered after the sale. He was not the foreclosing mortgagee, but apparently the latter would have the same right. Both of these parties were mechanic's lienors entitled to share equally in the proceeds of the sale. Under an earlier statute, the courts had decided that a foreclosing mortgagee who recovered a deficiency could *redeem from his own sale* as a judg-

[61] Note 46 *supra.*

ment creditor,[62] and *Twogood v. Ocsay* indicates that the same result would be reached under the present act.

Assuming this to be true, when would a foreclosing mortgagee wish to redeem and what would he gain by it? We will consider a hypothetical case, Illustration IV. C_1 held a \$10,000 mortgage given by D on land worth \$15,000. C_1 foreclosed, and finding no junior liens of record, decided to bid only \$6,000. He bought the land for this amount and recovered a \$4,000 deficiency. A month later C_2 recovered a \$100 judgment against D. He filed a transcript and notice of intent to redeem. C_1 then consulted a lawyer, who advised him that C_2 could take the premises from him by paying \$6,000 plus interest. He suggested that C_1 file the transcript of his deficiency judgment and a notice to redeem. Then if C_2 redeemed during his ten-day period, C_1 could re-redeem from him by paying \$6,100. The practical result is exactly like *Plute v. Schick*,[63] namely, to enable the foreclosing mortgagee to keep the land upon paying off C_2's judgment. The procedure in Illustration IV, however, enables C_1 to pay off C_2 regardless of the special equities existing in the *Schick* case. It can be seen, therefore, that the *Schick* and *Twogood* cases can be used by the mortgagee to escape the penalties for underbidding.

Our hypothetical mortgagee discovered that the power to redeem from his own sale gave him an even greater advantage than the one just discussed. Why wait until someone else recovers a judgment against the mortgagor when he can file the transcript as soon as he recovers his deficiency judgment? Then he would be a lienor subsequent to the foreclosed mortgage but prior to any judgment creditor who files later. The mortgagee-purchaser can file his notice of intent to redeem and sit back to see what happens. If junior liens and notices of intent are filed, he redeems within the ten-day period and no one can redeem from him for less than \$10,000. If there are no such notices, he does not redeem, keeping the land and the deficiency judgment. Of course if the land is really worth \$15,000 and C_2's judgment is small, C_1 would actually prefer the position of a junior lienor entitled to redeem from C_2. The danger in waiting is that someone may file a judgment so large that it would not pay C_1 to redeem from it. It should be further noted that the filing of the transcript of the deficiency judgment is only designed to protect C_1 against liens filed subsequently. Liens filed before the sale retain their priority over the deficiency judgment.

It follows from this discussion that some rather strange results follow from the rule permitting the foreclosing mortgagee to redeem from his own sale.[64] It is probably advisable to amend

[62] Bailey v. Merritt, 90 Colo. 338, 9 P. 2d 485 (1932); Harrington v. Anderson, 87 Colo. 417, 288 Pac. 1049 (1930); Leavitt v. Continental Trust Co., 71 Colo. 3, 203 Pac. 666 (1922).

[63] Note 59 supra.

[64] Our courts apparently adopted the rule from Illinois. Leavitt v. Continental Trust Co., note 62 *supra.* For criticism of the Illinois rule see OSBORNE ON MORTGAGES, § 310, note 88 (1951).

the statute to prevent this, and also to repeal the rule of *Plute v. Schick.*

MISCELLANEOUS REDEMPTION PROBLEMS

When the last redemptioner keeps the land, what becomes of the claim which he holds against the mortgagor? The better view is that the debt is paid to the extent of the value of the land, less the amount paid to redeem, and this view is accepted in Colorado.[65] In Illustration I, C_4 paid $12,000 to redeem and his own judgment was for $500. If the value of the land was $12,300, the judgment would be reduced to $200.

At a foreclosure sale involving rental property, the court sometimes orders the sale to include the rents during the redemption period. This was true in *The Norman, Inc. v. Holman.*[66] The purchaser on foreclosure paid a substantially larger sum for the privilege of acquiring the rents, and it was this larger sum that was paid by a redemptioner. The purchaser claimed the right to retain these rents after the redemption, but the court correctly ruled that they were part of the estate sold on foreclosure and passed to the redemptioner.

During the redemption period, the mortgagor continues to be the "owner" for certain purposes. He has the right of possession and his "title" is not divested until the sheriff's deed is delivered.[67] Even after the standard redemption period has expired, the mortgagor has an insurable interest and is entitled to the full amount of the insurance in the event of a loss.[68] On the other hand, the purchaser on foreclosure is considered the "owner" during the redemption period for purposes of the Mechanic's Lien Law.[69] Quite likely the mortgagor could also be considered an owner for this purpose.

The problem of redemption by owners of fractional interests after foreclosure often arises and is controlled by the principles previously stated in connection with the equitable right of redemption. The Colorado cases are concerned with the right of a judgment creditor to redeem, when his judgment is against one of two persons having undivided interests in the land. Redemption is permitted on payment of the *full amount* of the certificate.[70] A curious fact variation is found in *Leach v. Torbert.*[71] A creditor had recovered a joint judgment against two persons, one of whom

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[65] Bailey v. Merritt, 90 Colo. 338, 9 P. 2d 485 (1932). *Accord*, Sprague v. Martin, 29 Minn. 226, 13 N. W. 34 (1882); OSBORNE ON MORTGAGES, § 310 (1951).

[66] 105 Colo. 294, 97 P. 2d 739 (1939).

[67] The court found a "constructive" delivery in Bankers' Building Association v. Fleming Lumber Co., 83 Colo. 335, 264 Pac. 1087 (1928), where the Public Trustee executed the deed and retained it in his possession.

[68] Farmers' Union Association v. San Luis State Bank, 86 Colo. 293, 281 Pac. 366 (1929). The fire occurred within the three months period for redemption by judgment creditors under the law as it stood at the time.

[69] COLO. STAT. ANN., c. 101, Art. 2 (1935). See case cited note 67 *supra*.

[70] Walker v. Wallace, 79 Colo. 380, 246 Pac. 553 (1926); Bailey v. Erny, 68 Colo. 211, 189 Pac. 18 (1920).

[71] 71 Colo. 85, 204 Pac. 334 (1922).

owned an undivided half interest in the foreclosed land, the other having no interest. The judgment creditor attempted to redeem, but as he had entered a satisfaction of the judgment against the debtor who owned part of the land, the court correctly held that this attempt was ineffective.

THE OLDER LEGISLATION

Before 1929 there were various provisions scattered through the Colorado statutes affecting the right to redeem from foreclosure sales. Most of these were retained in the Colorado Statutes Annotated (1935),[72] in spite of the repealer clause to be discussed. There was a statute giving a right of redemption from execution sales,[73] and a separate section providing that redemption from foreclosure sales should be governed thereby.[74] Another statute controlled redemption from sales by the Public Trustee.[75]

These statutes, like the present one, provided for a standard redemption period of six months. Judgment creditors of the security debtor could redeem within a three-months period following the standard period. It was immaterial whether such creditors held a lien, but only those having an actual judgment had a right to redeem after the standard period. Junior mortgagees could redeem *within* the standard period when the sale was under an execution or foreclosure. In the case of sales by Public Trustee, there was a separate provision for encumbrancers to redeem, apparently during the standard period.

Originally there was no provision that judgment creditors should redeem in the order of their priority, any such creditor being allowed to redeem any time within the three months. This created a "race of diligence" since, if a creditor whose judgment was senior failed to redeem until some junior creditor had done so, the former could not redeem without paying the junior judgment and so forfeiting his priority.[76] The effect of "revival of liens" on this rule will be discussed later. As the statute stood in 1921, two-day periods were set up in which lienors could redeem in order of their priority. The method of redemption by judgment creditors was cumbersome, requiring a second sale by the redeeming creditor after he had paid the redemption money.

The adoption of the present redemption law in 1929 [77] was a great improvement. A single method was made applicable to mortgage foreclosures, sales on execution and sales by Public Trustee. The three months period was abolished and judgment creditors, as well as other lienors, were allotted specific and exclusive periods to redeem. The method of redemption was sim-

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[72] COLO. STAT. ANN., c. 40, §§71-78; c. 93, §§ 60-66 (1935).

[73] COLO. COMP. LAWS, §§ 5950-5956 (1921).

[74] *Id.* § 5078.

[75] *Id.* §§ 5053-5060.

[76] Paddack v. Staley, 13 Colo. App. 363, 58 Pac. 363 (1899); Stryker v. Dunn, 72 Colo. 45, 209 Pac. 644 (1922)

[77] Colo. Laws 1929, c. 151.

plified and improved. Under this law the purchaser at the sale could receive a deed after six months if no notices of intent to redeem were filed, instead of nine months.

There was a general repealer clause in the new act [78] with a saving clause as to mortgages and deeds of trust executed prior to the passage of the act.[79] In the rare event that a mortgage of such an ancient vintage should be foreclosed, the purchaser should take care not to have the deed issued before the end of the nine months period.[80]

CASES INTERPRETING THE OLD STATUTES

Of the many decisions discussing the rules governing redemption prior to 1929, many have been rendered obsolete by statutory changes, while others still have some value as precedents. In the former category are included cases involving the revival of liens. The importance and difficulty of this problem justifies a brief summary of these cases.

Floyd v. Sellers [81] laid down a rule that *all* liens revived when the security debtor (judgment debtor) redeemed, and that *no* liens revived when a judgment creditor redeemed. The first branch of the rule was qualified in *Mihoover v. Walker*,[82] which held that *junior* liens revive but not the lien of the foreclosed mortgage upon redemption by the *owner*. This is the rule now in force by the express terms of the 1929 Act.[83]

The rule denying revival of liens when a judgment creditor redeems was discussed at length, and apparently approved, in *Paddack v. Staley*,[84] and was applied in *Jenkins v. Gold Dollar Mining and Milling Co.*[85] so as to cut out an intervening mortgagee who had failed to redeem. Then came the important case of *Stryker v. Dunn.*[86] This was the first case arising under the statute permitting redemption by subsequent encumbrances from a Public Trustee's Sale. The court held that redemption by C_3, holder of a third deed of trust, after foreclosure by C_1, revived the lien of C_2, holder of an intermediate deed of trust, who had failed to redeem. The older cases, all decided under a different statute, were not cited.

The last case decided under the old law was *Harrington v. Anderson*,[87] which cannot be reconciled with *Stryker v. Dunn.* This also involved a Public Trustee's sale. The foreclosing holder

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[78] *Id.* § 11.

[79] The saving clause provides for redemption under the old law "where the method of redemption is part of the contract." The effect of this limitation is not clear.

[80] Morris, *Foreclosure by Sale by Public Trustee*, 28 DICTA 437 (1951).

[81] 7 Colo. App. 498, 44 Pac. 373 (1896).

[82] 63 Colo. 22, 164 Pac. 504 (1917)

[83] COLO. STAT. ANN., c. 40, § 161 (1935).

[84] Note 76 *supra.*

[85] 27 Colo. App. 247, 149 Pac. 269 (1915).

[86] 72 Colo. 45, 209 Pac. 644 (1922).

[87] Colo. 417, 288 Pac. 1049 (1930).

of the senior trust deed recovered a junior judgment and redeemed from his own sale. This was held to cut out the lien of an intervening recorded judgment. No mention was made of *Stryker v. Dunn.* If any amendments to the statute had a bearing on this change in the law, there is nothing in the opinion to indicate this.

With the case-law on revival of liens in this confused and unsatisfactory state, the rule of the 1929 Act comes as a welcome relief. *No liens* revive when a *lienor* redeems: *junior liens,* but not the *lien of the foreclosed mortgage,* revive when the owner redeems. Admittedly, this is paraphrasing the statute. Only the effect of redemption by the owner has been passed on by the courts,[88] and there is a remote possibility that the effect of redemption by a lienor may be interpreted so as to permit revival of liens. It is devoutly to be hoped that nothing of this sort will occur.

Importance of the Redemption Statute

Actual redemption is a rare phenomenon. No genuine case of redemption by the owner has come before the Colorado Supreme Court in thirty years. There are only a handful of cases involving redemption by lienors during this time, and none at all concerning redemption by persons liable on a deficiency. Many lawyers go through years of practice without ever handling a case in which redemption is attempted. This may easily create the impression that the subject is one of only theoretical interest, to be studied only when the situation arises directly.

This would be a very shortsighted view. The very existence of the possibility of redemption is an important factor in every foreclosure. In the first place, without a thorough knowledge of the Redemption Act, a lawyer may request the Sheriff or Public Trustee to issue a deed prematurely. Again, he may find himself in a procedural bog such as engulfed the Home Owners' Loan Corporation in the *Meyer* case,[89] resulting in an altogether unintended redemption. More to the point, however, is the fact that a lawyer cannot properly advise a foreclosing mortgagee as to the amount he should bid at the sale, unless he realizes the possible loss which may result if a redemption should happen to follow. The statute is designed to exert a mental coercion upon the mortgagee, compelling him to bid a fair price if he is cognizant of the terms of the statute. Ignorance of them, as the court pointed out in the *Meyer* case, will not excuse the mortgagee or relieve him of his difficulties. The time necessary for a lawyer to acquire a thorough understanding of the redemption law will be well spent, and will enable him to give the kind of advice which will prevent mortgagees from making mistakes such as those often appearing in the reported cases.

Many states have no redemption statutes, and some of these

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[88] Home Owners Loan Corporation v. Meyer, 110 Colo. 501, 136 P. 2d 282 (1943).

[89] 110 Colo. 501, 136 P. 2d 282 (1943).

have abandoned them after a thorough trial. The whole idea of permitting redemption after foreclosure has been severely criticized. It adds to the length of time that must intervene before the purchaser at the foreclosure sale gets a clear title. This definitely discourages speculative bidding, almost the only kind that can be expected at foreclosure sales, except for persons seeking to protect their own interests. It has been pointed out that everything which adds to a lender's expense sooner or later is charged as a cost to the borrower.[90]

In view of these considerations, can the Colorado Redemption Act be considered a worthwhile piece of legislation? The arguments seem to be fairly evenly balanced. We have had redemption so long that it seems unlikely that the practice will be abandoned. On the whole it is not advisable to sacrifice the favorable results of the redemption law, which produce higher bids by mortgagees and lower deficiency judgments. The possibility that interest rates might be lower and mortgage money easier to obtain if there were no redemption law is too uncertain to justify giving up these very positive advantages.

Is it possible to improve the method of redemption? Some question may be raised as to whether liens should be revived when the owner redeems. This revival has been thought necessary to protect the junior lienors when redemption by the owner comes first. It has been suggested that if the period of redemption by lienors *preceded* the period for redemption by the owner, there would be no need for revival of liens.[91] The Colorado statute might be improved by reversing the time for redemption by owners and lienors and shortening the period for the owner to redeem to three months in order to promote speculative bidding at the foreclosure sale.

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[90] Bridewell, *The Effects of Defective Mortgage Laws on Home Financing*, 5 LAW AND CONTEMP. PROBLEMS 544 (1938).

[91] Durfee and Doddridge, *Redemption from Foreclosure Sale—The Uniform Act*, 23 MICH. L. REV. 825 (1925).

I WOT THAT LAWYERS WITEN MUCH

I am sure that no attorney would attempt to use any word with which he was not thoroughly familiar and am therefore amazed at the profound learning of my brethren at the Bar and their knowledge of early English words. The verb "wot" has a very ancient and noble lineage and a well established place in the English language which today is preserved almost solely by lawyers and such other conveyancers as are allowed by Committees on Unauthorized Practice to ply their trade. For the enlightenment of less informed laymen the verb "wot" is almost the exact equivalent of "know." The original form, in the present, was I wot, thou wottest, he wot or wotteth; we, you and they witen. The form of "wot" found most frequently is the "to wit" used in most conveyances in a manner which, but for common usage, would be of highly questionable syntax.

T. J. O'NEILL.