

No. 88853-1

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SUPREME COURT  
OF THE STATE OF WASHINGTON

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BANK OF AMERICA, N.A.,

Petitioner,

vs.

MICHAEL FULBRIGHT, et ux.,

Respondents.

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AMICUS MEMORANDUM OF  
AMERICAN COLLEGE OF MORTGAGE ATTORNEYS  
IN SUPPORT OF PETITION FOR REVIEW

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Re: Published Decision of  
the Court Of Appeals (Division One) No. 67608-3-1

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ORIGINAL

**TABLE OF AUTHORITIES**

**Cases**

*First Nat. Bank & Trust Co., Woodbury v. MacGarvie*  
22 N.J. 539, 126 A.2d 880 (1956) .....9

*Geo. M. McDonald & Co. v. Johns*  
62 Wash. 521, 523 P. 175 (1911) .....6

*Hart v. Peoples Nat'l Bank*  
91 Wn.2d 197, 588 P.2d 204 (1978).....4

*Malm v. Griffith*  
109 Wash. 30, 186 P. 647 (1919) ..... 10

*Salsberry v. Ritter*  
48 Cal. 2d 1, 306 P.2d 897 (1957)..... 9

*Scott, et al. v. Patterson*  
1 Wash. 487, 20 P. 593 (1889) .....7

*Skach v. Sykora*  
6 Ill.2d 215, 127 N.E.2d 453 (1955).....8

*Summerhill Village Homeowner's Association v. Roughley*  
166 Wn. App. 625, 270 P.3d 639,  
amended, \_\_\_ Wn. App. \_\_\_, 289 P.3d 645 (2012) .....3

*United States v. Ellis*  
714 F.2d 953 (9th Cir. 1983) .....9

**Statutes**

RCW 6.23.010 .....2

RCW 6.23.020(1) .....2

RCW 61.12.093 .....2

RCW 61.24.050(1) ..... 10

RCW 64.34.364(1) .....	3
RCW 64.34.364(5) .....	9
RCW 64.34.364(9) .....	9
RCW 65.08.070 .....	7

**Laws**

Session Laws of 1869-1875, ch. 32, § 365 .....	5
Laws of 1899, ch. 53, § 7 .....	5
Laws of 1987, ch. 442, § 701 .....	5
Laws of 2013, ch. 53, § 1 (SB5541) .....	5

**Other Authorities**

<i>Statutory Redemption Rights</i> , 3 Wash. L. Rev. 177 (1928) .....	8
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This case, *BAC Home Loan Servicing, LP v. Fulbright*, \_\_\_ Wn. 2d \_\_\_, 298 P.3d 779 (2013) (“*BAC Home Loans*”) arises from a very simple fact pattern.

A condominium association had been formed by the recording of its condominium declaration. One of the residential “units” created by the formation of the condominium was later sold to a consumer, who financed the acquisition of her unit with a \$277,000 mortgage loan from an institutional lender, Bank of America. The home mortgage<sup>1</sup> was duly recorded. The homeowner later defaulted on her condominium dues. The condominium association elected to bring a judicial foreclosure of their lien and obtained a judgment of foreclosure. A sheriff’s sale was held, and the unit sold to a third-party bidder, Fulbright, for only about \$14,500, being the assessment amount plus attorneys’ fees and costs.

It is uncontested that the purchase money mortgage held by the consumer’s lender, Bank of America, had been extinguished by the association’s foreclosure sale. Under the Condominium Act, if a condominium association elects to judicially foreclose its lien for homeowners’ assessments, the association’s lien priority (for up to six months of assessments) is measured from the original date when the

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<sup>1</sup> For ease of discussion, the word “mortgage” will include deeds of trust, except when the context otherwise requires

condominium was created (by recordation of its declaration).<sup>2</sup> Bank of America, whose own lien priority was measured from the subsequently-occurring recordation of its mortgage, was junior to the association's lien, and thus the mortgage was extinguished. The mortgage lender made a timely effort to redeem, but this was resisted by the successful bidder at the sheriff's sale, Fulbright.

The issue was put to the Superior Court, which ruled for Fulbright. The Court of Appeals affirmed and held that the purchase money mortgage lender, Bank of America, was not a qualified "redemptioneer" under Washington's redemption act, RCW 6.23.

The redemption act provides for a redemption period following a sheriff's sale conducted under a judicial foreclosure. During this period (usually one year),<sup>3</sup> certain "redemptioners" have the right to redeem the foreclosed property by paying the successful bidder the amount of his/her bid, with interest. Until its very recent one-word amendment,<sup>4</sup> the redemption act, at RCW 6.23.010, defined "redemptioners" as the judgment debtor and any "creditor having a lien by judgment, decree, deed of trust, or mortgage . . . subsequent in time to that on which the property was sold."

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<sup>2</sup> RCW 65.34.364.

<sup>3</sup> RCW 6.23.020(1) (one year or in some cases eight months); see also RCW 61.12.093 (abandonment by mortgagor).

The Court of Appeals found that Bank of America could not redeem in this case because its purchase money mortgage was not “subsequent in time” to the foreclosed homeowners association lien. This finding was based on the same rationale as in a “factually similar” case decided last year by the Court of Appeals, *Summerhill Village Homeowners Association v. Roughley*<sup>5</sup> (“*Summerhill*”). Indeed, *Summerhill* involved virtually the same fact pattern, albeit a different mortgage lender, GMAC. *Summerhill* found that redemption act’s wording -- “subsequent in time” -- referred to the date when a lien is “acquired” or “arise[s].”<sup>6</sup> The Court found in this case, *BAC Home Loans*, that “subsequent in time” referred to the date when a lien “arises,” “came into existence” or “first exists.”<sup>7</sup>

Both cases also hold that a condominium association’s lien for an assessment does not arise until the assessment is due. In each case, the Court of Appeals based this conclusion upon RCW 64.34.364(1), a subsection of the Condominium Act which states that the condominium association “has a lien on a unit” for unpaid assessments “from the time the assessment is due.” Since the mortgage was created before the

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<sup>4</sup> Laws of 2013, ch. 53, § 1 (SB5541)

<sup>5</sup> *Summerhill Village Homeowner's Association v. Roughley*, 166 Wn. App. 625, 270 P.3d 639, amended \_\_\_ Wn. App. \_\_\_, 289 P.3d 645 (2012).

<sup>6</sup> 289 P.3d at 648 and fn. 7.

<sup>7</sup> 298 P.3d at 780, 781, 782.

particular delinquent assessments first became due (as will invariably be the case for a purchase money lender), the Court of Appeals concluded that the assessment lien arose later in time, and the lender had no redemption rights, at least under the Court of Appeals' analysis of the words "subsequent in time" in the redemption act.

The Court of Appeals' analysis was erroneous, because, among other reasons, the Court failed to see the obvious ambiguity in the redemption act's phrase "subsequent in time." **Time of what?**

The ambiguity of "subsequent in time" is that it could refer either to the point in time at which a lien arises, or the point in time from which its priority is measured -- which, under real property law, are not necessarily the same points in time.

The Court of Appeals should have acknowledged this statutory language for what it was -- a simple ambiguity -- and then should have interpreted the statute in light of its legislative purpose. *Hart v. Peoples Nat'l Bank*, 91 Wn.2d 197, 208, 588 P.2d 204 (1978) (if an act is subject to two interpretations, that which best advances the legislative purpose should be adopted). Such a proper analysis leads to only one conclusion: That the words in question, "subsequent in time," were always intended by the legislature to refer to the time from which the priority of each particular lien is measured. The recent one-word amendment to the

redemption act, clarifying that “subsequent in time” means “subsequent in priority,”<sup>8</sup> only confirms what the redemption act has meant all along.

The words “subsequent in time” can be traced to Washington State’s original 1899 version of the redemption act.<sup>9</sup> Moreover, a virtually identical definition of “redemptioneer” can be seen in Washington’s territorial laws, *circa* 1869-1875.<sup>10</sup> Both before and after statehood, Washington’s statutes defined “redemptioners” as the judgment debtor and any “creditor having a lien by judgment, decree or mortgage<sup>11</sup> . . . subsequent in time to that on which the property was sold.”

What point in time did those early legislative words, “subsequent in time,” mean to refer to? Under Washington real property law, then and now, the point in time at which a lien “arises” (exists, is created, attaches), and the point in time from which its priority is measured -- are not necessarily the same point in time.

This can be illustrated by a very simple example: Assume that a debtor executes, acknowledges and delivers a mortgage against his real property on Day 1 in favor of Lender A. Debtor executes, acknowledges and delivers another mortgage against the same property on Day 2, in

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<sup>8</sup> Laws of 2013, ch. 53, § 1 (SB5541)

<sup>9</sup> Laws of 1899, ch. 53, § 7 (Tab 2 of the Appendix)

<sup>10</sup> Session Laws 1869-1875, ch. 32, § 365 (Tab 1 of Appendix)

<sup>11</sup> The words “deed of trust” were added in front of the words “mortgage” by Laws of 1987, ch. 442, § 701 (Tab 3 of Appendix).

favor of Lender B. Each mortgage was given for good and valuable new consideration. Lender B records its mortgage first, on Day 3, without knowledge of Lender A's mortgage. Lender A records its mortgage on Day 4.

Under this fact pattern, there is no question in Washington but that Lender A's mortgage was the first to "arise," the first to "exist," the first to "attach" to the land. A mortgage exists when it has been executed and delivered to the creditor ("mortgagee") by the person who owns the real estate interest being mortgaged ("mortgagor"). As between the mortgagee and mortgagor, recording is not necessary to create a mortgage lien enforceable against the mortgagor and his/her real property. As the Washington Supreme Court said in 1911, and as is true today:

The doctrine of mortgages was originally, of course, purely equitable, and is yet as between the mortgagor and the mortgagee; and as between them it makes no difference whether the mortgage is recorded or not. The recording statutes were for the purpose, as is universally understood now, of giving constructive notice to innocent purchasers and incumbrancers.

*Geo. M. McDonald & Co. v. Johns*, 62 Wash. 521, 523, 114 P. 175 (1911)  
(emphasis added).

Under the same fact pattern, however, it is also true that the mortgage of Lender A, although attaching to the land (arising, created) one day before Lender B's mortgage, would still be junior in priority to

Lender B. Because Lender B had no knowledge of Lender A's mortgage and is thus a bona fide purchaser or mortgagee under Washington's race-notice recording statute,<sup>12</sup> the time from which priority is measured would be the respective recording dates of the two mortgages, not the dates when the mortgages were created. Lender B, as a bona fide mortgagee who recorded without notice, clearly would have the senior lien, even though Lender A's mortgage was created first.

As in this example, there can indeed be a difference between the point in time at which a lien "arises" (exists, is created, attaches), and the point in time from which its priority is measured. Which point in time did the Washington legislature intend to refer to?

Again, in cases of statutory ambiguity, the purpose of the enactment is the best guide. *Hart v. Peoples Nat'l, supra*. Early on, the benevolent legislative purpose of statutory redemption was described in *Scott et al. v Patterson*, 1 Wash. 487, 489, 20 P. 593 (1889), as follows:

*There is to our mind but little force in the contention of appellant, who relies upon the principle that redemption is a statutory creation, and must be strictly pursued. While this is true, it is also equally true that such statutory provisions are somewhat allied to those of exemption, and the same liberal rule of construction, for analogous reasons, should be applied to both. They are of a benevolent character, and in each the main object is the prevention of oppression or sacrifice of an unfortunate debtor. (emphasis added).*

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<sup>12</sup> RCW 65.08.070.

If the intent of having a redemption period following a judicial foreclosure is to benefit the debtor, why then has Washington always given “redemptioner” status not only to the debtor, but also to mortgages or judgment liens “subsequent in time” to the lien on which the debtor’s property was sold by the sheriff? The answer, which is particularly apt when the lien being judicially foreclosed is a relatively small amount (like mechanics liens, small consumer debts or condominium dues), is that redemption rights will force the purchaser to either bid an amount close to the fair market value of the property, or face the likelihood that junior-priority lienors, although extinguished by the judicial sale, will exercise their redemption rights to buyout the purchaser for any patently below-market bid. The salutary effect is to have an amount approaching fair market value of the debtor’s real property “pay as many of his liabilities as possible.” *Note, Statutory Redemption Rights*, 3 Wash. L. Rev. 177 (1928), at p. 177 (emphasis added). As astutely observed in *Skach v. Sykora*, 6 Ill. 2d 215, 127 N.E.2d 453, 456 (1955) and echoed in decisions of those states, including Washington, which have redemption statutes:

*The purpose of the redemption statute is to give the debtor time and opportunity to avoid the loss of his property and to give his other creditors an opportunity to collect their debts from any surplus over the [foreclosed] debt. The statutes are not intended to take the landowner's property unjustly or for an inadequate consideration. . . . The statute contemplates redemption where the value of the property exceeds the sale price. The purchaser knows*

*this when he makes his bid, whether he is the mortgagee or a stranger, and when he is repaid all that the statute allows upon redemption, that is all he is either legally or equitably entitled to receive. (emphasis added)*

Interpreting the “subsequent in time” language to refer to the time of priority fully effectuates this salutary purpose.<sup>13</sup>

Moreover, when the Condominium Act was enacted in 1990, there were clear indications of legislative intent to preserve the unit mortgagee’s redemption rights in any judicial foreclosure of the association’s super-priority assessments. RCW 64.34.364(9) expressly refers to the “period of redemption” that will apply in the association’s judicial foreclosure of its assessment liens. Further, RCW 64.34.364(5) expressly abrogates the association’s super-priority over mortgages if the association elects to foreclosure its assessments lien non-judicially under RCW 61.24 (where redemption rights do not exist) rather than judicially under RCW 61.12 (where redemption rights do exist). The legislative objective in this cannot be missed: If the unit is sold at a judicial foreclosure sale for the typical relatively small amount of six months’ dues, then the redemption act’s salutary purpose should come into play, allowing the extinguished

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<sup>13</sup> *United States v. Ellis*, 714 F.2d 953, 956 (9th Cir. 1983) (applying Washington law) (“redemption rights . . . force the sale price closer to the true market value”); see also *Salsberry v. Ritter*, 48 Cal. 2d 1, 306 P.2d 897, 902 (1957) (“one of the primary purposes”); *First Nat. Bank & Trust Co., Woodbury v. MacGarvie*, 22 N.J. 539, 545, 126 A.2d 880, 883 (1956) (“drive the sale price at foreclosure to an amount approximating

mortgage lender to redeem, payout the bidder and apply the full property value to its mortgage loan, thereby reducing the overall debt burden of the debtor. On the other hand, if the association elects to foreclose non-judicially where there are no redemption rights (RCW 61.24.050), then there is no super-priority, the lender's mortgage lien is not disturbed, and the lender will still have recourse to its mortgage security (the unit), again reducing the overall debt burden of the debtor. It is thus unimaginable that the 1990 legislature understood "subsequent in time" in the same constrictive way as the Court of Appeals, so that purchase money mortgages would not have redemption rights in any condominium assessment foreclosure. If that were true, the only liens with such rights would be judgments or mortgages (e.g., hard money mortgages) filed against a financially distressed unit owner at the proverbial "last minute," after he or she has already defaulted on their condominium dues.

For the foregoing reasons, this Court should reverse.

DATED this 7<sup>th</sup> day of July, 2013.

GRAHAM & DUNN PC

By   
Douglas J. Smart WSBA# 8579  
Attorneys for American College of  
Mortgage Attorneys

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fair value"). See also *Malm v. Griffith*, 109 Wash. 30, 33, 186 P. 647 (1919) (mortgage created before but recorded after another was "in effect, subsequent in time").

**CERTIFICATE OF SERVICE**

I certify that on the 8th day of July, 2013, I caused a true and correct copy of the foregoing document, **Amicus Memorandum of American College of Mortgage Attorneys in Support of Petition for Review**, to be served by messenger on the following:

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Douglas S. Smart, WSBA #8579

No. 88853-1

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SUPREME COURT  
OF THE STATE OF WASHINGTON

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BANK OF AMERICA, N.A.,

Petitioner,

vs.

MICHAEL FULBRIGHT, et ux.,

Respondents.

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APPENDIX TO MEMORANDUM OF AMERICAN COLLEGE OF  
MORTGAGE ATTORNEYS

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Re: Published Decision of  
The Court Of Appeals (Division One) No. 67608-3-I

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<b>Laws</b>	<b>Tab</b>
Session Laws of 1869-1875, ch. 32, § 365 .....	1
Laws of 1899, ch. 53, § 7 .....	2
Laws of 1987, ch. 442, § 701 .....	3
Laws of 2013, ch. 53, § 1 (SB5541) .....	4
 <b>Statutes</b>	
RCW 6.23.010, 020(1).....	5
RCW 61.12.093 .....	6
RCW 61.24.050(1).....	7
RCW 64.34.364(1), (5), (9) .....	8
RCW 65.08.070 .....	9
 <b>Other Authorities</b>	
<i>Statutory Redemption Rights</i> , 3 Wash. L. Rev. 177 (1928)	10
 <b>Other Jurisdictions</b>	
<i>Skach v. Sykora</i> , 6 Ill. 2d 215, 127 N.E.2d 453 (1955)	11
<i>United States v. Ellis</i> , 714 F.2d 953 (9th Cir. 1983)	12
<i>First Nat. Bank &amp; Trust Co., Woodbury v. MacGarvie</i> , 22 N.J. 539, 126 A.2d 880, 883 (1956)	13

**Tab 1**

LAWS  
OF  
WASHINGTON

A PUBLICATION OF THE SESSION LAWS OF WASHINGTON  
TERRITORY, INCLUDING THE GENERAL LAWS AND RESO-  
LUTIONS OF THE YEARS 1854 TO 1888 INCLUSIVE; THE  
FEDERAL AND COLONIAL ORDERS TREATIES  
ACTS AND ORDINANCES AFFECTING LAND  
TITLES IN WASHINGTON.

FROM THE ORIGINAL ROLLS

IN FIVE VOLUMES

CONTAINING THE LAWS AND RESOLUTIONS OF THE YEARS  
1869 TO 1875 INCLUSIVE.

SEATTLE, WASHINGTON:  
TRIBUNE PRINTING COMPANY.

1895.

contributing, shall be entitled to the benefit of the judgment to enforce contribution or repayment, if within thirty days after his payment, he file with the clerk of the court where the judgment was rendered, notice of his payment and claim to contribution or repayment. Upon filing such notice, the clerk shall make an entry thereof in the margin of the docket where the judgment is entered.

Sec. 364. Upon a sale of real property, when the estate is less than a leasehold of two years unexpired term, the sale shall be absolute. In all other cases, such property shall be subject to redemption, as hereinafter provided in this chapter. At the time of sale the sheriff shall give to the purchaser a certificate of the sale, containing:

1. A particular description of the property sold.
2. The price bid for each distinct lot or parcel.
3. The whole price paid.

4. When subject to redemption, it shall be so stated. The matters contained in such certificate shall be substantially stated in the sheriff's return of his proceedings upon the writ.

Sec. 365. Property sold subject to redemption, as provided in the last section, or any part thereof separately sold, may be redeemed by the following persons or their successors in interest:

1. The judgment debtor or his successor in interest, in the whole or any part of the property separately sold.
2. A creditor having a lien by judgment, decree or mortgage on any portion of the property, or any portion of any part thereof, separately sold, subsequent in time to that on which the property was sold.

The persons mentioned in subdivision two of this section are termed redemptioners.

Sec. 366. The judgment debtor or redemptioner may redeem the property within six months from the date of the order confirming the sale, by paying the amount of the purchase money, with interest at the rate of two per centum per month thereon from the time of sale, together with the amount of any taxes which the purchaser may have paid thereon, and if the purchaser be also a creditor having a lien prior to that of the redemptioner, the amount of such lien with interest.

Sec. 367. If the property be so redeemed by a redemptioner, either the judgment debtor or any other redemptioner, may within sixty days from the last redemption, again redeem it on paying the sum paid on the last redemption, with interest at the rate of two per centum per month thereon, from the date of the last preceding redemption, in addition together with the amount of any taxes which the last redemp-

tioner may have paid  
of such redempti  
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together with the amou  
redemptioner, and the  
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redemption shall be giv  
Sec. 368. If 1  
months from the conf  
be entitled to a conve  
whenever sixty days l  
been made, the time f  
last redemptioner sh  
sheriff. If the judg  
the time for redempt  
be terminated and he  
Sec. 369. The  
vided in this section:

1. The person se  
or redemptioner, as  
intention to apply to  
and place specified in  
paying to the sheriff  
the person redeeming  
tion adding therein  
redeemed and the d  
shall submit to the s  
follows:

2. Proof that th  
given to the purchas

3. If he be a li  
judgment or decree  
deem, certified by th  
or decree is docketed  
the certificate of the

4. A copy of a  
claim, verified by th  
the amount then act  
gage.

5. If the reden  
that of the lien cred  
or purchaser shall s

**Tab 2**

be made to the proceedings concerning the sale; but if the sale be confirmed, such proceeds shall be paid to said party of course; otherwise they shall remain in the custody of the clerk until the sale of the property has been disposed of.

SEC. 7. Property sold subject to redemption, as above <sup>Redemption.</sup> provided, or any part thereof separately sold, may be redeemed by the following persons, or their successors in interest:

1. The judgment debtor or his successor in interest, in the whole or any part of the property separately sold.
2. A creditor having a lien by judgment, decree or mortgage, on any portion of the property, or any portion of any part thereof, separately sold, subsequent in time to that on which the property was sold. The persons mentioned in sub-division two of this section are termed redemptioners.

SEC. 8. The judgment debtor or his successor in interest, or any redemptioner, may redeem the property at any time within one year after the sale, on paying the amount of the bid, with interest thereon at the rate of eight per cent. per annum to the time of redemption, together with the amount of any assessment or taxes which the purchaser or his successor in interest may have paid thereon after purchase, and like interest on such amount; and if the purchaser be also a creditor having a lien, by judgment, decree or mortgage, prior to that of the redemptioner, other than the judgment under which such purchase was made, the amount of such lien with interest. <sup>Who may redeem.</sup>

SEC. 9. If property be so redeemed by a redemptioner, <sup>Re-redemption.</sup> another redemptioner may, within sixty days after the last redemption, again redeem it from the last redemptioner by paying the sum paid on such last redemption with interest at the rate of eight per cent. per annum, and the amount of any taxes or assessment which the last redemptioner may have paid thereon after the redemption by him, with like interest on such amount, and in addition thereto by paying the amount of any liens, by judgment, decree or mortgage, held by said

**Tab 3**

(3) Section 272, page 183, Laws of 1854, section 365, page 96, Laws of 1869, section 372, page 81, Laws of 1877, section 369, Code of 1881 and RCW 6.24.120.

PART VII

REDEMPTIONS OF REAL PROPERTY FROM FORCED SALES

Sec. 701. Section 7, chapter 53, Laws of 1899 and RCW 6.24.130 are each amended to read as follows:

(1) Real property sold subject to redemption, as ~~((above))~~ provided in RCW 6.24.030, or any part thereof separately sold, may be redeemed by the following persons, or their successors in interest:

~~((1))~~ (a) The judgment debtor ~~((or his successor in interest))~~, in the whole or any part of the property separately sold.

~~((2))~~ (b) A creditor having a lien by judgment, decree, deed of trust, or mortgage, on any portion of the property, or any portion of any part thereof, separately sold, subsequent in time to that on which the property was sold. The persons mentioned in ~~((subdivision (2) of this section))~~ this subsection are termed redemptioners.

(2) As used in this chapter, the terms "judgment debtor," "redemptioneer," and "purchaser," refer also to their respective successors in interest.

Sec. 702. Section 8, chapter 53, Laws of 1899 as last amended by section 4, chapter 276, Laws of 1984 and RCW 6.24.140 are each amended to read as follows:

(1) Unless redemption rights have been precluded pursuant to RCW 61.12.093 et seq., the judgment debtor ~~((or his successor in interest))~~ or any redemptioner~~((;))~~ may redeem the property from the purchaser at any time (a) within eight months after the date of the sale if the sale is pursuant to judgment and decree of foreclosure of any mortgage executed after June 30, 1961, which mortgage declares in its terms that the mortgaged property is not used principally for agricultural or farming purposes, and in which complaint the judgment creditor has expressly waived any right to a deficiency judgment, or (b) otherwise within one year after the date of the sale~~((, on paying))~~.

(2) The person who redeems from the purchaser must pay: (a) The amount of the bid, with interest thereon at the rate provided in the judgment to the time of redemption, together with (b) the amount of any assessment or taxes which the purchaser ~~((or his successor in interest may have))~~ has paid thereon after purchase, and like interest on such amount from time of payment to time of redemption, together with (c) any sum paid by the purchaser on a prior lien or obligation secured by an interest in the property to the extent the payment was necessary for the protection of the interest of the judgment debtor~~((, the judgment debtor's successor in interest))~~ or a redemptioner ~~((which the purchaser or the purchaser's successor in interest may have paid thereon with))~~, and like interest upon every

**Tab 4**

CERTIFICATION OF ENROLLMENT

**SENATE BILL 5541**

63rd Legislature  
2013 Regular Session

Passed by the Senate March 11, 2013  
YEAS 47 NAYS 2

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**President of the Senate**

Passed by the House April 9, 2013  
YEAS 93 NAYS 0

---

**Speaker of the House of Representatives**

Approved

---

**Governor of the State of Washington**

CERTIFICATE

I, Hunter G. Goodman, Secretary of the Senate of the State of Washington, do hereby certify that the attached is **SENATE BILL 5541** as passed by the Senate and the House of Representatives on the dates hereon set forth.

---

**Secretary**

FILED

**Secretary of State  
State of Washington**

---

**SENATE BILL 5541**

---

Passed Legislature - 2013 Regular Session

**State of Washington                      63rd Legislature                      2013 Regular Session**

**By** Senators Hobbs, Fain, Hatfield, and Harper

Read first time 02/04/13. Referred to Committee on Financial Institutions, Housing & Insurance.

1            AN ACT Relating to redemption of real property; and amending RCW  
2 6.23.010.

3 BE IT ENACTED BY THE LEGISLATURE OF THE STATE OF WASHINGTON:

4            **Sec. 1.** RCW 6.23.010 and 1987 c 442 s 701 are each amended to read  
5 as follows:

6            (1) Real property sold subject to redemption, as provided in RCW  
7 6.21.080, or any part thereof separately sold, may be redeemed by the  
8 following persons, or their successors in interest:

9            (a) The judgment debtor, in the whole or any part of the property  
10 separately sold.

11            (b) A creditor having a lien by judgment, decree, deed of trust, or  
12 mortgage, on any portion of the property, or any portion of any part  
13 thereof, separately sold, subsequent in (~~time~~) priority to that on  
14 which the property was sold. The persons mentioned in this subsection  
15 are termed redemptioners.

16            (2) As used in this chapter, the terms "judgment debtor,"  
17 "redemptioner," and "purchaser(~~(τ)~~)" refer also to their respective

1 successors in interest.

--- END ---

SB 5541.PL

p. 2

**Tab 5**

RCW 6.23.010

Redemption from sale — Who may redeem — Terms include successors.

**\*\*\* CHANGE IN 2013 \*\*\* (SEE 5541.SL) \*\*\***

(1) Real property sold subject to redemption, as provided in RCW 6.21.080, or any part thereof separately sold, may be redeemed by the following persons, or their successors in interest:

(a) The judgment debtor, in the whole or any part of the property separately sold.

(b) A creditor having a lien by judgment, decree, deed of trust, or mortgage, on any portion of the property, or any portion of any part thereof, separately sold, subsequent in time to that on which the property was sold. The persons mentioned in this subsection are termed redemptioners.

(2) As used in this chapter, the terms "judgment debtor," "redemptioner," and "purchaser," refer also to their respective successors in interest.

[1987 c 442 § 701; 1899 c 53 § 7; RRS § 594. Prior: 1897 c 50 § 15. Formerly RCW 6.24.130.]

**Tab 6**

RCW 61.12.093

Abandoned improved real estate — Purchaser takes free of redemption rights.

In actions to foreclose mortgages on real property improved by structure or structures, if the court finds that the mortgagor or his or her successor in interest has abandoned said property for six months or more, the purchaser at the sheriff's sale shall take title in and to such property free from all redemption rights as provided for in RCW 6.23.010 et seq. upon confirmation of the sheriff's sale by the court. Lack of occupancy by, or by authority of, the mortgagor or his or her successor in interest for a continuous period of six months or more prior to the date of the decree of foreclosure, coupled with failure to make payment upon the mortgage obligation within the said six month period, will be prima facie evidence of abandonment.

[2012 c 117 § 162; 1965 c 80 § 1; 1963 c 34 § 1.]

Notes:

Deed to issue upon request immediately after confirmation of sale: RCW 6.21.120.

**Tab 7**

RCW 61.24.050

Interest conveyed by trustee's deed — Sale is final if acceptance is properly recorded — Redemption precluded after sale — Rescission of trustee's sale.

(1) Upon physical delivery of the trustee's deed to the purchaser, or a different grantee as designated by the purchaser following the trustee's sale, the trustee's deed shall convey all of the right, title, and interest in the real and personal property sold at the trustee's sale which the grantor had or had the power to convey at the time of the execution of the deed of trust, and such as the grantor may have thereafter acquired. Except as provided in subsection (2) of this section, if the trustee accepts a bid, then the trustee's sale is final as of the date and time of such acceptance if the trustee's deed is recorded within fifteen days thereafter. After a trustee's sale, no person shall have any right, by statute or otherwise, to redeem the property sold at the trustee's sale.

(2)(a) Up to the eleventh day following the trustee's sale, the trustee, beneficiary, or authorized agent for the beneficiary may declare the trustee's sale and trustee's deed void for the following reasons:

(i) The trustee, beneficiary, or authorized agent for the beneficiary assert that there was an error with the trustee foreclosure sale process including, but not limited to, an erroneous opening bid amount made by or on behalf of the foreclosing beneficiary at the trustee's sale;

(ii) The borrower and beneficiary, or authorized agent for the beneficiary, had agreed prior to the trustee's sale to a loan modification agreement, forbearance plan, shared appreciation mortgage, or other loss mitigation agreement to postpone or discontinue the trustee's sale; or

(iii) The beneficiary or authorized agent for the beneficiary had accepted funds that fully reinstated or satisfied the loan even if the beneficiary or authorized agent for the beneficiary had no legal duty to do so.

(b) This subsection does not impose a duty upon the trustee any different than the obligations set forth under RCW 61.24.010 (3) and (4).

(3) The trustee must refund the bid amount to the purchaser no later than the third day following the postmarked mailing of the rescission notice described under subsection (4) of this section.

(4) No later than fifteen days following the voided trustee's sale date, the trustee shall send a notice in substantially the following form by first-class mail and certified mail, return receipt requested, to all parties entitled to notice under RCW 61.24.040(l) (b) through (e):

NOTICE OF RESCISSION OF TRUSTEE'S SALE

NOTICE IS HEREBY GIVEN that the trustee's sale that occurred on (trustee's sale date) is rescinded and declared void because (insert the applicable reason(s) permitted under RCW 61.24.050(2)(a)).

The trustee's sale occurred pursuant to that certain Notice of Trustee's Sale dated . . . . ., recorded . . . . ., under Auditor's File No. . . . ., records of . . . . County, Washington, and that certain Deed of Trust dated . . . . ., recorded . . . . ., under Auditor's File No. . . . ., records of . . . . County, Washington, from . . . ., as Grantor, to . . . ., as . . . ., as original Beneficiary, concerning the following described property, situated in the County(ies) of . . . ., State of Washington, to wit:

(Legal description)

Commonly known as (common property address)

(5) If the reason for the rescission stems from subsection (2)(a)(i) or (ii) of this section, the trustee may set a new sale date not less than forty-five days following the mailing of the notice of rescission of trustee's sale. The trustee shall:

(a) Comply with the requirements of RCW 61.24.040(1) (a) through (f) at least thirty days before the new sale date; and

(b) Cause a copy of the notice of trustee's sale as provided in RCW 61.24.040(1)(f) to be published in a legal newspaper in each county in which the property or any part of the property is situated, once between the thirty-fifth and twenty-eighth day before the sale and once between the fourteenth and seventh day before the sale.

[2012 c 185 § 14; 1998 c 295 § 7; 1965 c 74 § 5.]

**Tab 8**

RCW 64.34.364  
Lien for assessments.

\*\*\* CHANGE IN 2013 \*\*\* (SEE 5077-S.SL) \*\*\*

- (1) The association has a lien on a unit for any unpaid assessments levied against a unit from the time the assessment is due.
- (2) A lien under this section shall be prior to all other liens and encumbrances on a unit except: (a) Liens and encumbrances recorded before the recording of the declaration; (b) a mortgage on the unit recorded before the date on which the assessment sought to be enforced became delinquent; and (c) liens for real property taxes and other governmental assessments or charges against the unit. A lien under this section is not subject to the provisions of chapter 6.13 RCW.
- (3) Except as provided in subsections (4) and (5) of this section, the lien shall also be prior to the mortgages described in subsection (2)(b) of this section to the extent of assessments for common expenses, excluding any amounts for capital improvements, based on the periodic budget adopted by the association pursuant to RCW 64.34.360(1) which would have become due during the six months immediately preceding the date of a sheriff's sale in an action for judicial foreclosure by either the association or a mortgagee, the date of a trustee's sale in a nonjudicial foreclosure by a mortgagee, or the date of recording of the declaration of forfeiture in a proceeding by the vendor under a real estate contract.
- (4) The priority of the association's lien against units encumbered by a mortgage held by an eligible mortgagee or by a mortgagee which has given the association a written request for a notice of delinquent assessments shall be reduced by up to three months if and to the extent that the lien priority under subsection (3) of this section includes delinquencies which relate to a period after such holder becomes an eligible mortgagee or has given such notice and before the association gives the holder a written notice of the delinquency. This subsection does not affect the priority of mechanics' or materialmen's liens, or the priority of liens for other assessments made by the association.
- (5) If the association forecloses its lien under this section nonjudicially pursuant to chapter 61.24 RCW, as provided by subsection (9) of this section, the association shall not be entitled to the lien priority provided for under subsection (3) of this section.
- (6) Unless the declaration otherwise provides, if two or more associations have liens for assessments created at any time on the same real estate, those liens have equal priority.
- (7) Recording of the declaration constitutes record notice and perfection of the lien for assessments. While no further recording of any claim of lien for assessment under this section shall be required to perfect the association's lien, the association may record a notice of claim of lien for assessments under this section in the real property records of any county in which the condominium is located. Such recording shall not constitute the written notice of delinquency to a mortgagee referred to in subsection (2) of this section.
- (8) A lien for unpaid assessments and the personal liability for payment of assessments is extinguished unless proceedings to enforce the lien or collect the debt are instituted within three years after the amount of the assessments sought to be recovered becomes due.
- (9) The lien arising under this section may be enforced judicially by the association or its authorized representative in the manner set forth in chapter 61.12 RCW. The lien arising under this section may be enforced nonjudicially in the manner set forth in chapter 61.24 RCW for nonjudicial foreclosure of deeds of trust if the declaration (a) contains a grant of the condominium in trust to a trustee qualified under RCW 61.24.010 to secure the obligations of the unit owners to the association for the payment of assessments, (b) contains a power of sale, (c) provides in its terms that the units are not used principally for agricultural or farming purposes, and (d) provides that the power of sale is operative in the case of a default in the obligation to pay assessments. The association or its authorized representative shall have the power, unless prohibited by the declaration, to purchase the unit at the foreclosure sale and to acquire, hold, lease, mortgage, or convey the same. Upon an express waiver in the complaint of any right to a deficiency judgment in a judicial foreclosure action, the period of redemption shall be eight months. Nothing in this section shall prohibit an association from taking a deed in lieu of foreclosure.
- (10) From the time of commencement of an action by the association to foreclose a lien for nonpayment of delinquent assessments against a unit that is not occupied by the owner thereof, the association shall be entitled to the appointment of a receiver to collect from the lessee thereof the rent for the unit as and when due. If the rental is not paid, the receiver may obtain possession of the unit, refurbish it for rental up to a reasonable standard for rental units in this type of condominium, rent the unit or permit its rental to others, and apply the rents first to the cost of the receivership and attorneys' fees thereof, then to the cost of refurbishing the unit, then to applicable charges, then to costs, fees, and charges of the foreclosure action, and then to the payment of the delinquent assessments. Only a receiver may take possession and collect rents under this subsection, and a receiver shall not be appointed less than ninety days after the delinquency. The exercise by the association of the foregoing rights shall not affect the priority of preexisting liens on the unit.
- (11) Except as provided in subsection (3) of this section, the holder of a mortgage or other purchaser of a unit who obtains the right of possession of the unit through foreclosure shall not be liable for assessments or installments thereof that became

due prior to such right of possession. Such unpaid assessments shall be deemed to be common expenses collectible from all the unit owners, including such mortgagee or other purchaser of the unit. Foreclosure of a mortgage does not relieve the prior owner of personal liability for assessments accruing against the unit prior to the date of such sale as provided in this subsection.

(12) In addition to constituting a lien on the unit, each assessment shall be the joint and several obligation of the owner or owners of the unit to which the same are assessed as of the time the assessment is due. In a voluntary conveyance, the grantee of a unit shall be jointly and severally liable with the grantor for all unpaid assessments against the grantor up to the time of the grantor's conveyance, without prejudice to the grantee's right to recover from the grantor the amounts paid by the grantee therefor. Suit to recover a personal judgment for any delinquent assessment shall be maintainable in any court of competent jurisdiction without foreclosing or waiving the lien securing such sums.

(13) The association may from time to time establish reasonable late charges and a rate of interest to be charged on all subsequent delinquent assessments or installments thereof. In the absence of another established nonusurious rate, delinquent assessments shall bear interest from the date of delinquency at the maximum rate permitted under RCW 19.52.020 on the date on which the assessments became delinquent.

(14) The association shall be entitled to recover any costs and reasonable attorneys' fees incurred in connection with the collection of delinquent assessments, whether or not such collection activities result in suit being commenced or prosecuted to judgment. In addition, the association shall be entitled to recover costs and reasonable attorneys' fees if it prevails on appeal and in the enforcement of a judgment.

(15) The association upon written request shall furnish to a unit owner or a mortgagee a statement signed by an officer or authorized agent of the association setting forth the amount of unpaid assessments against that unit. The statement shall be furnished within fifteen days after receipt of the request and is binding on the association, the board of directors, and every unit owner, unless and to the extent known by the recipient to be false.

(16) To the extent not inconsistent with this section, the declaration may provide for such additional remedies for collection of assessments as may be permitted by law.

[1990 c 166 § 6; 1989 c 43 § 3-117.]

Notes:

**Effective date -- 1990 c 166:** See note following RCW 64.34.020.

**Tab 9**

RCW 65.08.070

Real property conveyances to be recorded.

A conveyance of real property, when acknowledged by the person executing the same (the acknowledgment being certified as required by law), may be recorded in the office of the recording officer of the county where the property is situated. Every such conveyance not so recorded is void as against any subsequent purchaser or mortgagee in good faith and for a valuable consideration from the same vendor, his or her heirs or devisees, of the same real property or any portion thereof whose conveyance is first duly recorded. An instrument is deemed recorded the minute it is filed for record.

[2012 c 117 § 208; 1927 c 278 § 2; RRS § 10596-2. Prior: 1897 c 5 § 1; Code 1881 § 2314; 1877 p 312 § 4; 1873 p 465 § 4; 1863 p 430 § 4; 1860 p 299 § 4; 1858 p 28 § 1; 1854 p 403 § 4.]

Notes:

RCW 65.08.070 applicable to rents and profits of real property: RCW 7.28.230.

**Tab 10**

## STATUTORY REDEMPTION RIGHTS

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

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

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<sup>1</sup> *Dane v. Daniel*, 23 Wash. 379, 63 Pac. 268 (1900) *Hardy v. Herriott*, 11 Wash. 460, 39 Pac. 958 (1895).

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

<sup>3</sup> *Scott v. Patterson*, Note 2.

<sup>4</sup> *Muller v. Harrison*, 46 S. D. 295, 192 N. W 750 (1923).

<sup>5</sup> *Scott v. Patterson*, Note 2.

<sup>6</sup> *Union Esperanza M. Co. v. Shandon M. Co.*, 18 N. M. 153, 135 Pac. 78 (1913).

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

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

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

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

<sup>11</sup> *Union Esperanza M. Co. v. Shandon*, Note 6.

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

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

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

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

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

<sup>13</sup> *Ft. Wayne Builders S. Co. v. Pfeiffer* Note 10.

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

<sup>15</sup> Sess. L. 1899, p. 87, Sec. 5, Sec. 584 Rem. Comp. Stat.

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

<sup>17</sup> Sec. 594, Rem. Comp. Stat.

<sup>18</sup> Webster's New International Dict.

he never had any, or has parted with all, interest in the land.<sup>19</sup> As said in one case<sup>20</sup>

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

And in another<sup>21</sup>

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

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

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

<sup>20</sup> *Yoakum v. Bowers*, Note 19.

<sup>21</sup> *Livingston v. Arnoux*, Note 19.

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

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

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

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

<sup>24</sup> *Higgs v. McDuffie*, Note 22.

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

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

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

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

Is it such a precedent?

It is not.

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

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

<sup>26</sup> See Note 16.

<sup>27</sup> Sec. 597, Rem. Comp. Stat.

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

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

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

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

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<sup>28</sup> *De Roberts v. Stiles*, Note 25, *Ford v. Nokomis State Bank*, Note 16.

<sup>29</sup> Cases in Note 28.

<sup>30</sup> *Schumacher v. Langford*, 20 Cal. App. 61, 127 Pac. 1057 (1912) *Big Sespe Oil Co. v. Cochran*, 276 Fed. 216 (C. C. A., 9th, 1921)

<sup>31</sup> *Livingston v. Arnoux*, Note 19 *Bateman v. Kellogg*, 59 Cal. App. 464, 211 Pac. 46 (1922).

<sup>32</sup> *Bollong v. Corman*, 125 Wash. 441, 217 Pac. 27 (1923).

of the sale are reinstated when either of those parties redeems.<sup>33</sup>

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

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

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

<sup>34</sup> *Willis v. Miller*, 23 Ore. 352, 31 Pac. 827 (1893).

<sup>35</sup> Case in Note 34.

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

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

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

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

appear in the action or suit, the deficiency is not restated as a lien on the land when redeemed by the judgment debtor.<sup>37</sup>

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

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

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

<sup>38</sup> Sec. 594, Rem. Comp. Stat.

<sup>39</sup> *Paddack v. Staley*, 13 Colo. App. 363, 58 Pac. 363 (1899)

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

though the proceeds of the sale be insufficient to pay the full amount due some.<sup>41</sup> As said of a case of this character.<sup>42</sup>

“There was one decree, and it was the decree of all the lienholders. The decree authorized one sale, and it was the sale of all the judgment creditors. If the property had sold for enough to satisfy the judgment of appellee (a lienholder given judgment in the cause,) in whole or in part, it could not be doubted that the sale was on its own judgment, and the fact that it did not sell for enough to satisfy its judgment does not change the principle which governs the case. The decree directed the property to be sold to pay all the liens, and made provision for distribution to the appellee and all other lien holders, so that there could only be one sale. \* \*

“As the law contemplates a final decree adjusting all rights and equities, and as such a decree was rendered in the foreclosure suit involved in this case, it necessarily results that a sale upon that decree was a sale on all the judgments embodied in it. This being true, it must also be true that none of the claimants in whose favor a judgment was incorporated in the decree of the court can redeem from the sale made by the decree.”

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

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

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

<sup>42</sup> *Horn v. Indianapolis Nat. Bank*, Note 41.

<sup>43</sup> Rem. Comp. Stat. (Wash., 1922), § 1129 et seq.

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

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

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

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

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

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

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

<sup>45</sup> *Camp v. Land*, 122 Cal. 167, 54 Pac. 839 (1898)

the same and pray dismissal. From the sale on B's behalf, C may redeem.<sup>46</sup>

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

As said in one case<sup>48</sup>

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

F. C. HACKMAN.\*

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<sup>46</sup> This deducible from rules 1 and 2, and cases cited in Notes 44 and 45.

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

<sup>48</sup> *Black v. Gerichten*, Note 44.

\*Of the Seattle bar.

**Tab 11**



Supreme Court of Illinois.  
 Patrick SKACH, Appellant,  
 v.  
 John O. SYKORA et al., Appellees.

No. 33379.  
 June 16, 1955.

Suit by purchaser at mortgage foreclosure sale to require both issuance to him of master's deed and cancellation of previously registered certificate of title. The Superior Court, Cook County, George M. Fisher, J., entered decree of dismissal and plaintiff appealed. The Supreme Court, Maxwell, J., held that where master erroneously informed mortgagors of amount necessary to redeem property, and where mortgagors paid such amount to master before expiration of redemption, mortgagors were held to have redeemed property.

Affirmed.

West Headnotes

**[1] Mortgages 266 ↪ 591(1)**

266 Mortgages

266XI Redemption

266k591 Right to Redeem in General

266k591(1) k. In General. Most Cited Cases

**Mortgages 266 ↪ 599(1)**

266 Mortgages

266XI Redemption

266k599 Time for Redemption

266k599(1) k. In General. Most Cited Cases

The right of redemption from judicial sale is purely statutory, and ordinarily cannot be exercised except within period of time and in manner provided by statute, and upon expiration of such period, all rights of mortgagor, and those claiming under him are terminated. S.H.A. ch. 77, § 18.

**[2] Mortgages 266 ↪ 599(1)**

266 Mortgages

266XI Redemption

266k599 Time for Redemption

266k599(1) k. In General. Most Cited Cases

Neither minors nor persons under physical or mental disability are entitled to redeem after expiration of redemption period from judicial sale.

**[3] Judicial Sales 229 ↪ 59**

229 Judicial Sales

229k59 k. Redemption. Most Cited Cases

There may be redemption after expiration of redemption period from judicial sale, where fraud or improper acts of purchaser in some way prevented redemption.

**[4] Mortgages 266 ↪ 380**

266 Mortgages

266X Foreclosure by Action

266X(A) Nature and Form of Remedy

266k380 k. Nature in General. Most Cited

Cases

Purpose of mortgage foreclosure is to enforce the payment of mortgagor's debt.

**[5] Mortgages 266 ↪ 592**

266 Mortgages

266XI Redemption

266k592 k. Statutory Provisions. Most Cited Cases

Purpose of redemption statute is to give debtor time and opportunity to avoid loss of his property and to give other creditors an opportunity to collect their debts from any surplus over any mortgage debt. S.H.A. ch. 77, § 18.

**[6] Mortgages 266 ↪ 600(1)**

266 Mortgages

266XI Redemption

266k600 Amount Required to Redeem

266k600(1) k. In General. Most Cited Cases

Statute providing for redemption of property sold on mortgage foreclosure protects purchaser to extent of his debt, cost and interest on his investment. S.H.A. ch. 77, § 18.

**[7] Mortgages 266 ↪ 600(1)**

266 Mortgages

266XI Redemption

266k600 Amount Required to Redeem

266k600(1) k. In General. Most Cited Cases

Statute, which provides for redemption of property on mortgage foreclosure, contemplates redemption where value of property exceeds sale price. S.H.A. ch. 77, § 18.

**[8] Mortgages 266 ↪ 591(1)**

266 Mortgages

266XI Redemption

266k591 Right to Redeem in General

266k591(1) k. In General. Most Cited Cases

Where inadequacy exists between fair cash value of property and a sale bid on mortgage foreclosure sales, justice and equity seek relief for injured party.

**[9] Mortgages 266 ↪ 592**

266 Mortgages

266XI Redemption

266k592 k. Statutory Provisions. Most Cited Cases

Cases

Redemptions being statutory privileges, they must be made in substantial compliance with statute, but, since law favors redemptions, unless injury results to purchaser at sale, a liberal construction favoring redemption will be given such statutes.

**[10] Mortgages 266 ↪ 599(1)**

266 Mortgages

266XI Redemption

266k599 Time for Redemption

266k599(1) k. In General. Most Cited Cases

Where master, because of mistake in computation of interest, erroneously informed mortgagors of amount necessary to redeem property, and where mortgagors paid such amount to master before expiration of redemption period, mortgagors were held to have redeemed their property, notwithstanding that redemption period had expired when mortgagors deposited with master the additional amount necessary to redeem. S.H.A. ch. 77, § 18.

\*216 \*\*454 Everett Lewy, Chicago, for appellant.

John Gutknecht, State's Atty., John M. Mahoney, Vernon Tittle, and James J. Hajek, Chicago (Gordon B. Nash, and Vincent P. Flood, Chicago, of counsel), for appellees.

MAXWELL, Justice.

Plaintiff, Patrick Skach, as the purchaser at a mortgage foreclosure sale, filed suit in the superior court of Cook County to require both the issuance to him of a master's deed and the cancellation of a previously registered certificate of redemption. The complaint, as amended, \*217 named the mortgagors, their assignees, the Cook County registrar of titles, a master in chancery of the superior court, and the trustee in bankruptcy of one of the mortgagors as parties defendant. After termination of all pleadings, a hearing was had thereon and the cause dismissed for want of equity. Since a freehold is here in issue, plaintiff has appealed directly to this court.

There is little dispute as to the facts involved. On October 31, 1950, a complaint was filed in the superior court of Cook County to foreclose a first mortgage on a house and lot owned by John O. Sykora and Alma R. Sykora, his wife, in Berwyn, Illinois. The property was stipulated to have had a fair cash value of between \$20,000 and \$23,000, and was registered under the Torrens system of registration. Pursuant to a decree of foreclosure entered therein, the premises were, on March 29, 1951, sold at public auction by the master in chancery to Patrick Skach, plaintiff herein, for the sum of \$8400 and a master's certificate of sale was thereafter issued. The proceeds of sale were more than sufficient to satisfy the decree of foreclosure and the surplus of \$340.72 was ordered deposited with the court clerk for the use and benefit of a junior mortgage and other defendants as their respective interests might appear.

On March 7, 1952, the sum of \$10,000 was borrowed by the mortgagors from Joseph and Josephine

Slemenda in return for which they executed a trust deed to the premises in question in the sum of \$10,000 to Vernon Tittle, trustee, which was duly registered. Thereafter John Sykora telephoned the master and inquired as to the amount of money that would be necessary to redeem the property. He was informed that \$8802.50 would be sufficient. This amount was paid on March 14, 1952, from the moneys that had been previously received from the Slemendas, and a certificate of redemption was then issued by the master to John O. and Alma R. Sykora. Said certificate was \*218 registered under the Torrens system on March 20, 1952. The plaintiff was not informed of these facts until May 28, 1952, at which time he tendered his certificate of sale and demanded the redemption money. Thereupon it was discovered by both the plaintiff and the master that the interest had been incorrectly computed at 5 per cent instead of at 6 per cent as provided by statute. The amount which should have been required to redeem on March 14, 1952, was \$8883. The collected On May 29, 1952, Vernon Tittle, trustee, .on May 29, 1952, Vernon Tittle, trustee, delivered a check in the sum of \$227.50 at the master's office for the purpose of redeeming as a judgment creditor. Since the master had no authority to accept redemption from a judgment creditor, the check was returned to Tittle on June 2, 1952. On June 17, 1952, John O. and Alma R. Sykora deposited the additional sum of \$212.10 with the master in chancery for the purpose of making up any deficiency in the amount originally paid by them on March 14, 1952. The sums so paid the master are still retained by him. The plaintiff on September 22, 1952, tendered his certificate of sale to the master, demanded a master's deed, and was refused. John O. Sykora was thereafter adjudged a bankrupt and a trustee was appointed and is still acting in this capacity.

The plaintiff contends that neither the mortgagors nor any judgment creditor satisfied the statutory requirements so as to effect a redemption, and that he is therefore entitled to a master's deed to the premises. This is the sole question now to be decided.

**\*\*455** Section 18 of the act relating to judgments, decrees and executions (Ill.Rev.Stat. 1951, chap. 77, par. 18) provides that the mortgagor may redeem from a foreclosure sale by paying to either the purchaser or the master, within twelve months from said sale, the sum of money for which the premises were sold, with interest thereon at the rate of six per centum per annum from the time of \*219 said sale, whereupon said sale and certificate shall be null and void. It is agreed that such sum was not paid by the defendants herein within the twelve-month period. They contend, however, that because of the mistake in computation of interest by the master, the period of redemption should be extended to the date upon which they tendered the deficiency.

[1][2][3] The right of redemption from a judicial sale is purely statutory, and ordinarily cannot be exercised except within the period of time and in the manner provided by the statute, Chicago Savings Bank & Trust Co. v. Coleman, 283 Ill. 611, 119 N.E. 587; Oldfield v. Eulert, 148 Ill. 614, 36 N.E. 615; Littler v. People ex rel. Hargadine, 43 Ill. 188, and upon expiration of such period, all rights of the mortgagor and those claiming under him are terminated. Hilton v. Meier, 257 Ill. 500, 100 N.E. 962. Even minors or persons under physical or mental disability are not entitled to redeem thereafter. 5 Nichols Illinois Civil Practice, sec. 5312; 37 Am.Juris. sec. 843. There may be an exception, however, where the fraud or improper acts of the purchaser has in some way prevented the redemption. Mohr v. Sibthorp, 395 Ill. 418, 69 N.E.2d 487; Block v. Hooper, 318 Ill. 182, 149 N.E. 21; Grigsby Illinois Real Property, vol. 3, sec. 1266.

Appellant contends that the right of redemption from a judicial sale is purely statutory, and ordinarily cannot be exercised except within the period of time and in the manner provided by statute. To support this general statement he cites Chicago Savings Bank & Trust Co. v. Coleman, 283 Ill. 611, 119 N.E. 587;

Oldfield v. Eulert, 148 Ill. 614, 36 N.E. 615, and Thornley v. Moore, 106 Ill. 496. None of these cases is precisely in point. The question in the instant case involves the rights of the mortgagor by an attempt to redeem from a foreclosure sale within the statutory period allowed for the mortgagor's redemption. The cases cited by appellant all involve attempted redemptions by a judgment creditor after the rights of the mortgagor had expired\*220 and his rights were not in issue. Equitable considerations can easily distinguish between an unfortunate debtor attempting to redeem his land and a judgment creditor who is seeking to take advantage of the provisions of the redemption statute to get a preference for his debt over other creditors.

Appellant cites but one case involving an attempted redemption by the mortgagor, Muir v. Mierwin, 385 Ill. 273, 52 N.E.2d 801. In this case the owners of the equity of redemption were eight brothers and sisters holding title as joint tenants. Within the statutory period four of them each tendered one-eighth of the sale price, costs and interest computed at five per cent and demanded certificates of redemption for their proportionate interests. The master in chancery accepted the tendered sums as deposits only and refused to issue certificates of redemption, not because the tenders were insufficient but because of an existing doubt of the right to redeem at all. The master also refused to issue a deed to the holders of the certificate of sale. The trial court ordered the deed issued. The Appellate Court reversed the trial court, holding that the joint owners had a right to redeem which the master denied them, not because their tender was insufficient but 'on the theory that the appellants had no right to redeem.' The Appellate Court further stated 'We find nothing in the abstract or record in this case to show that the question of whether the appellants had tendered a sufficient amount to redeem their property was ever raised in the trial court.' Muir v. Mierwin, 319 Ill.App. 286, 49 N.E.2d 265, 267. This court granted the holders of the certificate of sale leave to appeal, reversed the Appellate Court and affirmed the

trial court. The decision of this court was based solely upon the wording of the \*\*456 statute and held that a tender of the amount due with interest computed at five per cent, rather than six per cent, was not a substantial compliance with the statute, and the fact that the master had other funds in his hands in which \*221 the redeemers claimed an interest did not aid them when their claim to such other funds had not been determined at the time of their tenders. We do not regard this decision, based on the facts then before the court, as establishing an invariable rule requiring strict compliance with the letter of the statute, and precluding a court of equity from considering the equities of case where the facts, circumstances and responsibilities of the parties are substantially different. Courts of equity are not so completely bound by such inflexible rules.

[4][5][6][7] The purpose of a mortgage foreclosure is to enforce the payment of the mortgagor's debt. The purpose of the redemption statute is to give the debtor time and opportunity to avoid the loss of his property and to give his other creditors an opportunity to collect their debts from any surplus over the mortgage debt. The statutes are not intended to take the landowner's property unjustly or for an inadequate consideration. They are not intended to penalize the debtor for his default nor to reward the purchaser by unjust enrichment above the amount of his debt at the expense of the landowner and his other creditors. The statute protects the purchaser to the extent of his bid, costs and interest on his investment. The statute contemplates redemption where the value of the property exceeds the sale price. The purchaser knows this when he makes his bid, whether he is the mortgagee or a stranger, and when he is repaid all that the statute allows upon redemption, that is all he is either legally or equitably entitled to receive. As was said in Hruby v. Steinman, 374 Ill. 465, 30 N.E.2d 7, 10, citing Phillips v. Demoss, 14 Ill. 410, 'That he (the purchaser) may be deprived of a deed will not avail him, as his right to the land is no higher or more sacred than to the redemption money, and the statute holds out no

inducements for a speculation at a sheriff's sale, beyond the interest provided for the use of the purchase money.' These being the purposes of a redemption statute a court of \*222 equity would not be justified in attaching a rigidity to its language which carried it beyond that purpose to work inequities.

In Gage v. Scales, 100 Ill. 218, a landowner attempting to redeem his land from a tax sale asked the county clerk for the amount necessary to redeem and upon the clerk's statement paid that amount. It was subsequently discovered that the clerk had made a mistake in computing the amount. In holding this to be a valid redemption under the statute the court at page 224 stated:

'It is true that appellees, on making the redemption, did not comply strictly with the requirement of the statute, as they failed to pay to the clerk a subsequent tax which had been paid by appellant while he held the tax certificate. But the report of the master, which is fully sustained by the evidence in the record, shows that appellees called upon the county clerk, whose duty it was to inform them of the amount necessary to be paid to make the redemption, and whose duty it was to receive the money, and that the full amount which this officer required was paid, and upon the receipt of the money he issued a certificate of redemption, which was delivered to appellees. Here was a mistake of an officer for which appellees were in no manner responsible. For this mistake shall they lose their land, or is it within the power of a court of equity to relieve as against that mistake, and thus protect appellees in the title to their land?

'Cooley, in his work on Taxation, in discussing this subject, says: 'Although redemption is a statutory right, yet a party attempting in good faith to make it, may be relieved against the mistakes or frauds of the officer or of the purchaser. If he has attempted to redeem, and done all he was required to do by those entitled to receive the money, the sale is discharged, even though in consequence of the mistake of the

officer he has paid less than the proper amount.'

\*223 \*\*457 'Here it is apparent the redemption was made in perfectly good faith. The money was paid to the proper officer, and the amount required by him, in the full belief that the sum paid was all that was necessary to redeem the land from the sale. We think the attempted redemption was sufficient to authorize a court of equity to grant relief against the mistake of the clerk.'

[8][9] In Converse v. Rankin, 115 Ill. 398, 4 N.E. 504, also involving a tax redemption by payment of the amount required by the county clerk, the court followed Gage v. Scales and said when the landowner had paid the clerk the amount he required and a certificate of redemption was issued, the land owner had done all that the law required him to do. In 21 A.L.R.2d 1280 it is stated that the rule in redemption from tax sales is almost universal that equity will grant relief where the honest attempt of the landowner is frustrated by the mistake, negligence or other fault of the collector. In addition to the mistake of the officer whose duty it was to advise appellees of the correct amount necessary to redeem, in the instant case we have the further circumstance demanding equitable consideration, in the gross inadequacy of the sale price. It was stipulated that the fair cash value of the property was between \$20,000 and \$23,000. The sale bid was \$8400. Where such inadequacy exists justice and equity seek relief for the injured party. In Block v. Hooper, 318 Ill. 182, 149 N.E. 21, 22, involving a redemption from a sale under execution, it was stated: 'It is admitted, as it must be, that the price paid at the judgment sale of this property is grossly inadequate, and the rule is that, where there are irregularities, fraud, or circumstances of unfairness connected with the sale, a court of equity may allow redemption upon equitable terms after the time for redemption has expired. (Citations.)'

The authority and procedure for redemptions from foreclosure sales, tax sales and sales under exe-

cution are all \*224 statutory, have the same purposes, and should be treated with the same rules of construction and enforcement. There is no logical or sensible reason or basis for equity to distinguish them. The general rule of construction is that, redemptions being statutory privileges, they must be made in substantial compliance with the statute, but, since the law favors redemptions, unless injury results to the purchaser at the sale, a liberal construction favoring redemptions will be given such statutes. Hruby v. Stenman, 374 Ill. 465, 30 N.E.2d 7; Nudelman v. Carlson, 375 Ill. 577, 32 N.E.2d 142; Mohr v. Sibthorp, 395 Ill. 418, 69 N.E.2d 487.

[10] In the instant case the appellees' attempt to redeem was in perfect good faith, it was defeated by the mistake of the master in chancery for which appellees were in no manner responsible, by such mistake appellees would suffer a loss of approximately \$11,000 to \$14,000, but by relieving appellees of this loss no injury is inflicted upon appellant. Under such circumstances appellees ought, in equity and good conscience, to be held to have redeemed their property.

The decree of the superior court so finding is affirmed.

Decree affirmed.

Ill. 1955  
Skach v. Sykora  
6 Ill.2d 215, 127 N.E.2d 453, 52 A.L.R.2d 1320

END OF DOCUMENT

**Tab 12**

714 F.2d 953  
(Cite as: 714 F.2d 953)



United States Court of Appeals,  
Ninth Circuit.  
UNITED STATES of America, Plaintiff-Appellee,  
v.  
James D. ELLIS, Defendant-Appellant.  
  
No. 82-3409.  
Argued and Submitted Feb. 10, 1983.  
Decided Sept. 1, 1983.

The Farmers Home Administration sought foreclosure of mortgage which included provision expressly waiving any rights to redemption. The United States District Court for the Eastern District of Washington, Justin L. Quackenbush, J., granted FmHA's motion for summary judgment and ordered sale of mortgagor's farm to satisfy the debt, and mortgagor appealed. The Court of Appeals, Skopil, Circuit Judge, held that mortgagor was entitled to redemption rights otherwise available under Washington state law even though mortgage included waiver provision.

Reversed.

#### West Headnotes

### [1] Federal Courts 170B 413

170B Federal Courts  
170BVI State Laws as Rules of Decision  
170BVI(C) Application to Particular Matters  
170Bk412 Contracts; Sales  
170Bk413 k. Government Contracts.  
Most Cited Cases

Rights of the United States against private citi-

zens with whom it has contracted in loan transactions are governed by federal law.

### [2] Federal Courts 170B 374

170B Federal Courts  
170BVI State Laws as Rules of Decision  
170BVI(A) In General  
170Bk374 k. Matters of General Jurisprudence; Federal Common Law. Most Cited Cases

Federal courts may look to other sources in developing federal common law, including law of the states.

### [3] Federal Courts 170B 374

170B Federal Courts  
170BVI State Laws as Rules of Decision  
170BVI(A) In General  
170Bk374 k. Matters of General Jurisprudence; Federal Common Law. Most Cited Cases

Whether or not state law will be adopted as federal common law depends on whether state law can be given effect without conflicting with federal policy.

### [4] Mortgages 266 596

266 Mortgages  
266XI Redemption  
266k596 k. Loss of Right by Lapse of Time, and Waiver, Estoppel, and Laches. Most Cited Cases

Mortgagor, who obtained direct loans from the Farmers Home Administration and whose mortgages were foreclosed on default, was entitled to redemption rights otherwise available to him under Washington

714 F.2d 953

(Cite as: 714 F.2d 953)

state law even though each of the mortgages contained a clause purporting to waive his right to debtor protections under state laws.

\*954 Carroll C. Gray, Spokane, Wash., for plaintiff-appellee.

Jerry L. Sorlien, Schillberg, Sorlien & Warring, Moses Lake, Wash., for defendant-appellant.

Appeal from the United States District Court for the Eastern District of Washington.

Before SKOPIL, PREGERSON, and FERGUSON, Circuit Judges.

SKOPIL, Circuit Judge:

During 1976, 1977 and 1978 Ellis obtained direct loans from Farmers Home Administration ("FmHA") under a program to provide financial assistance to farmers who are unable to obtain credit from private lenders on reasonable terms. 7 U.S.C. § 1922. Ellis executed two mortgages on the farm property to secure the loans. Each was embodied in a standard form used by the FmHA with a clause purporting to waive the mortgagor's right to debtor protections under state laws, including the right to redeem following foreclosure sale.

Ellis encountered financial difficulty and was unable to continue repayment of the loans, leaving a balance due of \$149,695.75 plus interest.

On April 1, 1981 the FmHA sought foreclosure of the mortgage on the Ellis farm. The district court granted FmHA's motion for summary judgment and ordered the sale of the property to satisfy the debt. The judgment specifically denied Ellis the right to redeem at any time. The district court held that where a mortgage held by the FmHA includes a provision expressly waiving any rights to redemption, federal law does not adopt state law granting rights of re-

demption. The district court relied principally on United States v. Stadium Apartments, Inc., 425 F.2d 358, 362-67 (9th Cir.), cert. denied, 400 U.S. 926, 91 S.Ct. 187, 27 L.Ed.2d 185 (1970).

Ellis appeals, seeking a modification of the judgment to provide for redemption rights otherwise available under Washington state law. We reverse.

#### DISCUSSION

[1][2] The rights of the United States against private citizens with whom it has contracted in loan transactions are governed by federal law. United States v. Kimbell Foods, Inc., 440 U.S. 715, 727, 99 S.Ct. 1448, 1457-58, 59 L.Ed.2d 711 (1979); \*955 United States v. Crain, 589 F.2d 996, 998 (9th Cir.1979); see United States v. Med O Farm, Inc., 701 F.2d 88, 90 (9th Cir.1983). While no federal statute or regulation provides appellant with the redemption rights he is claiming, federal courts may look to other sources in developing federal common law, including the law of the states. Textile Workers Union v. Lincoln Mills, 353 U.S. 448, 457, 77 S.Ct. 912, 918, 1 L.Ed.2d 972 (1957); Crain, 589 F.2d at 999; United States v. Best, 573 F.2d 1095, 1101 (9th Cir.1978). Even when an "action arises under and is clearly determined by federal law, state law limiting the enforcement of a federal right is sometimes adopted as the federal rule." United States v. Haddon Haciendas Co., 541 F.2d 777, 783 (9th Cir.1976).

[3] Whether or not state law will be adopted as the federal common law depends on "whether the state law can be given effect without ... conflicting with federal policy." Crain, 589 F.2d at 999, (quoting Haddon Haciendas, 541 F.2d at 784); Stadium Apartments, 425 F.2d at 368. See United States v. Yazell, 382 U.S. 341, 352-57, 86 S.Ct. 500, 506-09, 16 L.Ed.2d 404 (1966); Clearfield Trust Co. v. United States, 318 U.S. 363, 367, 63 S.Ct. 573, 575, 87 L.Ed. 838 (1943); United States v. MacKenzie, 510 F.2d 39, 41-42 (9th Cir.1975) (en banc).

714 F.2d 953

(Cite as: 714 F.2d 953)

[4] The government argues that Washington law, which grants debtors a right to redeem within one year of the foreclosure sale,<sup>FN1</sup> should not be adopted as federal common law in this case. It is urged that recognizing a right of redemption would increase the costs of the FmHA loan programs by chilling bidding at foreclosure sales and requiring the United States to purchase the property and hold it during the redemption period. The government asserts that these added operating costs would defeat the federal policy of maintaining a credit fund available to farmers at reasonable rates.

FN1. See Wash.Rev.Code Ann. § 6.24.140 (West Supp.1983).

The fact that increased costs may result from the adoption of state law regarding debtor and creditor rights is not controlling. Both the Supreme Court and this court have adopted state law despite added costs to loan programs when state law did not jeopardize other federal interests. *See, e.g., Kimbell Foods, Inc.*, 440 U.S. at 740, 99 S.Ct. at 1464-65; *Yazell*, 382 U.S. at 352-57, 86 S.Ct. at 506-09; *Crain*, 589 F.2d at 999-1000; *MacKenzie*, 510 F.2d at 42.

*Crain* is particularly instructive in this regard. Harold and Ethel Crain personally guaranteed a Small Business Administration (“SBA”) loan made to Haining Lumber Company, Inc. The guarantee provided that the SBA could proceed against the Crains upon default without pursuing any rights it might have against the principal debtor. A clause in the guarantee purported to waive rights under Arizona state law providing that a creditor must first seek satisfaction from the principal debtor. Over the government’s assertions that adoption of state law would create additional financial burdens on the loan fund, we required the SBA to proceed first against Haining Lumber Company. 589 F.2d at 1000. Despite the additional costs, we found that adoption of state law

was consistent with the overriding purpose behind the Small Business Act, that “the Government should aid, counsel, assist, and protect, insofar as is possible, the interests of small business concerns in order to preserve free competitive enterprise ... and to maintain and strengthen the overall economy of the nation.” 15 U.S.C. § 631(a). *Id.* at 999-1000 n. 4.

The FmHA loan program at issue here has a similar purpose. The Act authorizing the loans, the Consolidated Farm and Rural Development Act, Pub.L. No. 87-128 Title III, § 301(b), 75 Stat. 307 (1961) (codified at 7 U.S.C. §§ 1921-1992), was intended “to provide for more effective credit services to farmers.” 7 U.S.C. § 1921. The Act specifically states that “[i]t is the sense of Congress that, in carrying out the provisions of the [Act] ... a high priority is placed on keeping existing farm operations operating.” 7 U.S.C. § 1921 (note). The Consolidated Farm and Rural Development Act is, in the words of the government, a “\*956 form of social welfare legislation” for farmers. The obvious purpose of the program is to support the farming segment of the economy, and, particularly relevant here, to help ease the financial burden on farmers when they encounter financial difficulty. *See generally* H.R.Rep. No. 95-986, 95th Cong., 2d Sess., reprinted in 1978 U.S.Code Cong. & Ad.News 1106, 1106-22. As in *Crain*, we find that the overriding federal purpose is not adversely affected, and may even be advanced, by adopting state law.

Our conclusion is bolstered by a consideration of the reasons why states have granted redemption rights. Statutory rights of redemption are a response to the harsh aspects of foreclosure by sale. Property sold at foreclosure theoretically goes to the highest of many bidders with sale proceeds going to the mortgagee to the extent necessary to satisfy his lien. Any surplus goes to satisfy junior liens. What is left, if any, goes to the mortgagor and represents his equity. Sale by bid was expected to provide a convenient means of disposing of the property at true market value established through competitive bidding.

714 F.2d 953  
 (Cite as: 714 F.2d 953)

Experience showed that the procedure did not protect the interests of the junior lienors or the mortgagor. The mortgagee was entitled to bid on credit up to the amount of the debt, an enormous advantage over other prospective bidders who were required to come up with cash. There would seldom be an interested outside buyer or junior lienor with cash at the time of sale. The mortgagee was therefore too frequently the only bidder at the sale, and the sale price was usually inadequate to permit junior lienors to realize anything on their claims or to provide surplus to the mortgagor.

Statutory rights of redemption give the mortgagor power to force the sale price closer to true market value. When sale at foreclosure is at an inadequate price, the purchaser (normally the mortgagee) runs the risk that the mortgagor or a junior lienor,<sup>FN2</sup> given the additional time to arrange financing, will exercise his right. In order to avoid this risk the mortgagor will bid adequately. The mortgagee and junior lienors, if any, will then be satisfied to the true value of the property and there will be no reason for exercising the redemption right. See generally, *Stadium Apartments*, 425 F.2d at 368-69 (Ely, C.J., dissenting); Dunfee & Doddridge, *Redemption From Foreclosure Sale*, 23 Mich.L.Rev. 825, 827-834 (1925).

FN2. Wash.Rev.Code Ann. § 6.24.130(2) provides rights of redemption to creditors having a lien by judgment, decree, or mortgage subsequent in time to that on which the property was sold.

Considering the dynamics of foreclosure and redemption, we fail to see how adoption of state law in this case is inconsistent with the federal policy of helping farmers through financial difficulty. Allowing the government the unchecked powers of a credit bidder at foreclosure sale would appear to defeat that purpose. It also is apparent that those who supply farmers with equipment, fertilizer, seed and the like

would be reluctant to provide those necessities on credit, as is commonly done, knowing that the government holds the power to force them, as junior lienors, to a loss in the event of foreclosure. Farmers unable to operate on a cash basis would be forced from the field. The alternative would be to seek primary financing from private lenders at less attractive rates than offered by the FmHA. Either result is inconsistent with the federal policy of strengthening the farming segment of the economy.

The government's reliance on *Stadium Apartments* is misplaced. *Stadium Apartments* held that federal law did not adopt state law granting post-foreclosure sale rights of redemption when the Federal Housing Authority forecloses a mortgage which it has guaranteed. That case involved a statute, the National Housing Act, the purpose of which was to spur homebuilding. 12 U.S.C. § 1738(a). We found that the added costs associated with redemption rights would defeat the primary purpose of the Act to build and make available as much housing as possible. *Stadium Apartments*, 425 F.2d at 364-67. Similarly, \*957 in *Haddon Haciendas Co.*, we declined to adopt state law barring deficiency actions following foreclosure of a loan under section 221(d)(4) of the National Housing Act, 12 U.S.C. § 1715(d)(4). We found that giving effect to the anti-deficiency laws of California would remove an incentive for borrowers to maintain their property, thereby defeating the purpose of the loan program to reduce or eliminate slum-like housing conditions. 541 F.2d at 782-84. It is clear that these cases are to be decided in light of the particular state and federal policies at stake. *MacKenzie*, 510 F.2d at 41.

The government makes much of the fact that the loan form utilized by the FmHA was a standard form. There was no individualized negotiation of the terms of the contract. The government argues that in these circumstances adoption of state law is inappropriate under *United States v. Yazell*, 382 U.S. 341, 86 S.Ct. 500, 16 L.Ed.2d 404 (1966) and *United States v.*

714 F.2d 953

(Cite as: 714 F.2d 953)

MacKenzie, 510 F.2d 39 (1975) (en banc).

We reject the government's contention. In *Yazell*, the dispositive issue was the relative weight of and the interaction between the state and federal interests involved. 382 U.S. at 352, 86 S.Ct. at 506-07. The Supreme Court held that state interests "should be overridden by the federal courts only where clear and substantial interests of the National Government ... will suffer major damage if the state law is applied." *Id.* The failure of the SBA to negotiate a waiver of state law protections was merely further reason not to grant the government rights no other creditor could have had.<sup>FN3</sup> *Accord*, MacKenzie, 510 F.2d at 41.

FN3. We note that, under Washington law, a waiver of the right of redemption in a mortgage contract is invalid. Boyer v. Paine, 60 Wash. 56, 110 P. 682 (1910); Batten v. Fallgren, 2 Wash.App. 360, 467 P.2d 882 (1970).

That individual negotiation is not critical to our determination is demonstrated by United States v. Crain, 589 F.2d 996 (1979). *Crain* was a standard form, non-negotiated loan that contained a clause that waived relevant state law debtors rights. We nevertheless adopted state law protections because they did not jeopardize any "clear and substantial interests" of the SBA loan program at issue. 589 F.2d at 1000.

Finally, we note that the FmHA has acknowledged the applicability of state redemption rights in its regulations. 7 C.F.R. § 1872.2(c)(1)(v) provides as follows:

*Servicing Government redemption rights.* If the Government did not have an opportunity or for other reasons did not protect its interest at the time of the foreclosure sale by a prior lienholder and has any redemption rights, the State Director will determine whether to redeem the property before the

redemption period expires.... This determination will be made at a time sufficiently prior to expiration of the redemption period to permit the exercise of the Government's rights.... If it is decided not to redeem the property, the right of redemption may be sold for its value by the State Director....

The only source of redemption rights for the government is state law. This section implicitly acknowledges that state law is applicable and provides for the exercise of redemption rights by the government. We hold that borrowers from the FmHA are entitled to state law redemption rights as well.

#### CONCLUSION

That portion of the district court's opinion denying Ellis his right of redemption is vacated. The case is remanded for the district court to determine what, if any, redemption rights Ellis is entitled to under state law. If it is determined that he is entitled to a period of redemption, the period should run from the time the district court's amended judgment is issued.

C.A.Wash.,1983.

U.S. v. Ellis

714 F.2d 953

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**Tab 13**

**H**

Supreme Court of New Jersey.  
FIRST NATIONAL BANK AND TRUST COM-  
PANY, WOODBURY, New Jersey, a National  
Banking Corporation, Plaintiff-Respondent,

v.

James B. MacGARVIE, The Atco National Bank, a  
National Banking Corporation, Edward Robbins, Sr.,  
and the State of New Jersey, Defendants-Respondents,  
and  
The United States of America, Defendant-Appellant.

No. A-30.

Argued Oct. 15, 1956.

Decided Nov. 13, 1956.

Proceeding by United States having tax lien  
against property sold on mortgage foreclosure sale for  
an order vesting property in United States by virtue of  
its exercise of right of redemption. The Superior  
Court, Chancery Division, 41 N.J.Super. 151, 124  
A.2d 345, entered judgment adverse to United States,  
and it appealed to the Superior Court, Appellate Di-  
vision, and the appeal was certified to the Supreme  
Court on its own motion. The Supreme Court, Burling,  
J., held that under statute allowing United States as a  
lienholder one year from date of sale of realty for  
satisfaction of prior lien to redeem from such sale,  
United States must offer purchaser entire amount of  
mortgage, interest, fees and costs, paid to mortgagee by  
purchaser for assignment of mortgage rather than  
merely purchase price bid and paid at sale, but it was  
error to discharge lien of United States upon property  
because sum tendered by it was insufficient.

Order modified and as modified affirmed.

West Headnotes

**[1] United States 393 ↪ 125(21)**

393 United States

393IX Actions

393k125 Liability and Consent of United  
States to Be Sued

393k125(21) k. Liens. Most Cited Cases

Statute respecting actions concerning property  
upon which United States has a lien constitutes a  
waiver of sovereign immunity by the United States in  
any action brought to quiet title or to foreclose a  
mortgage or other lien on real or personal property on  
which United States has or claims a mortgage or other  
lien. 28 U.S.C.A. § 2410.

**[2] Internal Revenue 220 ↪ 4781**

220 Internal Revenue

220XXIII Liens

220k4781 k. Priority in General. Most Cited  
Cases

(Formerly 220k1719)

Relative priority of federal tax liens with other  
liens, in absence of statutory authority, is governed by  
the principle of first in time, first in right.

**[3] Liens 239 ↪ 23**

239 Liens

239k23 k. Redemption. Most Cited Cases

Legal consequences attaching to a right of re-  
demption and the method of foreclosure are governed  
by the law of the *lex rei sitae*.

**[4] Internal Revenue 220 ↪ 3010**220 Internal Revenue

220I Nature and Extent of Taxing Power in General

220I(B) Effect of State Laws and Judicial Decisions

220k3010 k. State Law Invoked by Federal Statute. Most Cited Cases

(Formerly 220k17)

**Internal Revenue 220 ↪ 3027**220 Internal Revenue

220I Nature and Extent of Taxing Power in General

220I(E) Construction and Operation of Revenue Laws in General

220k3027 k. In General. Most Cited Cases  
(Formerly 220k121)

Statutes concerning federal revenues are to be construed in the light of uniformity and their provisions are not to be taken as subject to state control or limitation unless language or necessary implication of the section involved makes its application dependent on state law.

**[5] Mortgages 266 ↪ 591(1)**266 Mortgages266XI Redemption

266k591 Right to Redeem in General

266k591(1) k. In General. Most Cited Cases

Generally, there are two types of redemption from mortgage foreclosure sale, the equitable right which is barred by the decree and sale, and the statutory right which does not arise until the sale takes place.

**[6] Mortgages 266 ↪ 591(1)**266 Mortgages266XI Redemption

266k591 Right to Redeem in General

266k591(1) k. In General. Most Cited Cases

Under New Jersey law, no right of redemption exists after sale following the foreclosure of the equity of redemption except by virtue of statute where the foreclosing creditor obtains a deficiency judgment in an action on the bond which the mortgage secures. N.J.S. 2A:50-4, N.J.S.A.

**[7] Mortgages 266 ↪ 600(1)**266 Mortgages266XI Redemption

266k600 Amount Required to Redeem

266k600(1) k. In General. Most Cited Cases

Under federal statute allowing United States one year from date of sale of realty for satisfaction of lien prior to that of United States to redeem property from such sale, United States must pay prior liens in order to redeem and therefore must offer purchaser entire amount of mortgage, interest, fees and costs, rather than the price bid and paid at sale. 28 U.S.C.A. § 2410(c).

**[8] Liens 239 ↪ 23**239 Liens

239k23 k. Redemption. Most Cited Cases

Where United States, acting upon its interpretation of statute giving it a right to redeem property sold for satisfaction of lien prior to that of United States, erroneously tendered an insufficient amount, trial court erroneously discharged lien of United States upon property because sum tendered in exercising right of redemption was insufficient, and United States would be given period of 30 days to petition the court

for determination of full amount due which was necessary to redeem premises and to make a tender thereof. 28 U.S.C.A. § 2410(c).

**\*541 \*\*881** John J. McCarthy, Washington, D.C., argued the cause for defendant-appellant, the United States (Herman Scott, U.S. Atty., Newark, and Charles H. Nugent, Asst. U.S. Atty., Camden, attorneys; Charles K. Rice, Andrew D. Sharpe, A. F. Prescott, John J. McCarthy, attorneys, Dept. of Justice, Washington, D.C., on the brief).

Norman Heine, Camden, argued the cause for plaintiff-respondent, Atco Nat. Bank, assignee of First Nat. Bank & Trust Co., Woodbury.

The opinion of the court was delivered by

BURLING, J.

The First National Bank and Trust Company, Woodbury, New Jersey, held a first mortgage on property of defendant MacGarvie securing a sum of nearly \$30,000. Default occurred and foreclosure proceedings were initiated by the first mortgagee. There were other parties who had liens encumbering the property at this time, in the following order of priority: Robbins, a judgment creditor (approximately \$1,400); the United States of America by virtue of a federal tax lien (approximately \$21,000); the Atco National Bank, a second mortgagee (approximately \$7,000).

Thereafter and prior to the foreclosure sale Atco National Bank purchased the first mortgage of the First National, **\*542** and itself prosecuted the foreclosure. Sale was had and the property bought in by Atco for \$100 on April 22, 1955. It received a deed and went into possession and has paid some \$1,284 in taxes and insurance to protect the property.

On April 20, 1956 the United States tendered \$106 (representing the purchase price at the sale and

interest thereon) to Atco and demanded a conveyance of the property. The invitation was declined. A motion was addressed to the Superior Court, Chancery Division, for an order and decree directing that the property be vested in the United States in view of this exercise of its right of redemption. The motion was denied after hearing before Judge Goldmann, 41 N.J.Super. 151, 124 A.2d 345 (Ch.1956). An appeal was addressed to the Superior Court, Appellate Division, and we have certified the cause prior to a review below.

[1] There is no issue on the joinder of the United States as a defendant in the **\*\*882** foreclosure suit. The procedural preliminaries were taken in view of 28 U.S.C.A. s 2410 (1950). This section constitutes a waiver of sovereign immunity by the United States in any action brought to quiet title or to foreclose a mortgage or other lien on real or personal property on which the United States has or claims a mortgage or other lien. Gerth v. United States, 132 F.Supp. 894 (D.C.S.D.Cal.1955); cf. Wells v. Long, 162 F.2d 842 (9 Cir., 1947); Van Keuren v. United States, 138 N.J.Eq. 66, 46 A.2d 815 (Ch.1946) (the latter two cases involved the substantially similar antecedent of section 2410 (28 U.S.C.A. ss 901-905 (1940 ed.)).

Of significance here is subsection (c) of section 2410:

'(c) A judicial sale in such action or suit shall have the same effect respecting the discharge of the property from liens and encumbrances held by the United States as may be provided with respect to such matters by the local law of the place where the property is situated. A sale to satisfy a lien inferior to one of the United States, shall be made subject to and without disturbing the lien of the United States, unless the United States consents that the property may be sold free of its lien and the proceeds divided as the parties may be entitled. Where a sale of real estate is made to satisfy a lien prior to that of the United States, the United **\*543** States shall have one year from the

date of sale within which to redeem. In any case where the debt owing the United States is due, the United States may ask, by way of affirmative relief, for the foreclosure of its own lien and where property is sold to satisfy a first lien held by the United States, the United States may bid at the sale of such sum, not exceeding the amount of its claim with expenses of sale, as may be directed by the head of the department or agency of the United States which has charge of the administration of the laws in respect of which the claim of the United States arises.' (Emphasis supplied.)

(The United States did not seek 'affirmative relief' in the instant case.)

The United States, through its attorneys, contended below and asserts here, that by virtue of the statutory sentence emphasized above it is entitled to redeem the property from the foreclosure sale by paying the purchaser Atco National Bank the price bid and paid at the sale. We are told that redemption refers either to the equitable right before sale or the statutory right after sale; that in the former case the right is exercised by tendering the amount due on the prior encumbrances while in statutory redemption it is only necessary to pay the amount realized at the foreclosure sale; that section 2410(c) represents the statutory right as opposed to the equitable right of redemption.

The trial court, although admitting the ingenuity of the argument, concluded that the term 'redeem' appearing in the statute could not be so interpreted, for Congress could not be charged with 'any such inequitable and unconscionable thing as to allow the Government, at any time up to a year after the sale, to come in, offer what was paid at the foreclosure sale, and immediately assume the position of senior lienholder, pushing everyone else into the background and thus, by wiping out the foreclosure bid, gain an advantage which it could never get at the foreclosure sale, or before it, by redeeming without paying the amount of the mortgage, the interest, the fees, and

everything else that might be due to the senior lienor. Redemption in our State has always meant repurchase, which means buying back, receiving back by paying off the existing obligation.' ( 41 N.J.Super. 151, 124 A.2d 348.)

\*544 The United States argues that the trial court erred in interpreting 'redeem' according to New Jersey law, urging a cardinal rule of construction in the area of \*\*883 federal taxation that statutory terms should be so defined as to receive a uniform application. See, e.g., United States v. Gilbert Associates, 345 U.S. 361, 73 S.Ct. 701, 97 L.Ed. 1071 (1953). Whether the error in approach is well founded need not detain us. We reach the same result solely upon a study of section 2410(c).

[2] Initially it is to be observed that the relative priority of federal tax liens, with other liens, absent statutory authority to the contrary, is governed by the principle "first in time, first in right," United States v. City of New Britain, Conn., 347 U.S. 81, 74 S.Ct. 367, 371, 98 L.Ed. 520 (1954); United States v. Sampsell, 153 F.2d 731 (9 Cir., 1946), a recognition that the rights of the sovereign are to be determined upon the same plane and with the same equitable attitude accorded claims in competition therewith. Cf. Potter v. United States, 111 F.Supp. 585 (D.C.R.I.1953).

[3][4] Secondly, it is a fundamental principle of the conflict of laws that legal consequences attaching to a right of redemption and the method of foreclosure are governed by the law of the *Lex rei sitae*. 2 Beale on *The Conflict of Laws*, secs. 227.1-228.1 (1935). The federal courts have long recognized and given effect to these matters as substantive rules of state property law. Metropolitan Nat. Bank v. Conn. Life Ins. Co., 131 U.S. Appendix clxii, 24 L.Ed. 1011 (1878); Parker v. Dacres, 130 U.S. 43, 9 S.Ct. 433, 32 L.Ed. 848 (1889); cf. United States v. Hutcherson, 188 F.2d 326 (8 Cir., 1951). At the same time, however, statutes concerning federal revenues are to be construed in the light of uniformity, and their provisions 'are not to be

taken as subject to state control or limitation unless the language or necessary implication of the section involved makes its application dependent on state law'. United States v. Pelzer, 312 U.S. 399, 402-403, 61 S.Ct. 659, 661, 85 L.Ed. 913, 916 (1941).

[5][6] \*545 Thirdly, the intricacies of 'statutory redemption' may not be overemphasized. As a general proposition there are but two types of redemption—the equitable right, which is barred by the decree and sale, Union Building & Loan Ass'n of Camden v. Childrey, 97 N.J.Eq. 20, 127 A. 253 (Ch.1924), and the statutory right, which does not arise until the sale takes place. See Eiceman v. Finch, 79 Ind. 511 (Sup.Ct.1881); Spurgin v. Adamson, 62 Iowa 661, 18 N.W. 293 (Sup.Ct.1884); 3 Wiltsie on Mortgage Foreclosure (5th Ed.), par. 1060. No right of redemption exists in New Jersey after sale following the foreclosure of the equity of redemption excepting by virtue of a statute, N.J.S. 2A:50-4, N.J.S.A., where the foreclosing creditor obtains a deficiency judgment in an action on the bond which the mortgage secures. The theory of redemption after foreclosure is to drive the sale price at foreclosure to an amount approximating fair value. Durfee & Doddridge, 'Redemption From Foreclosure Sale-The Uniform Mortgage Act,' 23 Mich.L.Rev. 825, 838-841 (1925). This is one common factor in 'statutory redemption,' but the internal workings of the system under the various state statutes which incorporate the theory exhibit 'manifold variations.' Durfee, Cases on Security, p. 289 (1951). Professor Durfee goes on to state, *Ibid*:

'Without pretending to have examined all the redemption statutes with the minuteness they deserve, I venture the following analysis of their scheme.

'All the statutes say more or less upon the following points. (a) The persons who may redeem: though the statutes vary widely in their phraseology, the net result is usually to give this privilege to all who, at the time of the sale, are interested in the equity of redemption. (b) The period within which redemp-

tion may be made: often there is one period for one class of persons, another period for another \*\*884 class; sometimes the periods run concurrently (overlapping), sometimes they run serially; the total period varies from three months to two years. (c) The sum that must be paid to redeem: the basic factor is the sale price, to which is added interest at a specified rate and almost invariably some other charges. (d) The effect of the redemption: here we meet questions so vexing that it would be silly to attempt any summation—the whole subject must be left to more leisurely exposition later on.'

\*546 In the light of these initial observations it is not unreasonable to believe that had Congress intended that which the Executive Branch now seeks it would not have confined itself to a single sentence expression. Lack of decisional authority or administrative interpretation by the Commissioner of Internal Revenue to support the defendant's position would not seem to be without reason.

Section 2410 originated in the 71st Congress as H.R. 980 and became the Act of March 4, 1931, c. 515, 46 Stat. 1528. The Senate version had provided for joinder of the United States as a party defendant in a foreclosure action if the sale were delayed one year after institution of suit. This was deleted by a Joint Committee of both Houses which substituted the sentence now in issue. Referring to the change the Committee stated:

'8. The Senate amendment contains a clause allowing the court to stay proceedings on sale until the expiration of the next session of Congress. This was no doubt intended to allow Congress to appropriate money to enable the United States, if a junior lien holder, to bid enough at the sale to take care of prior liens and thus protect its own. In place of that the substitute bill provides that if a junior lien holder, the United States shall have a year in which to redeem. That does away with any necessity for a delay of sale. In many States of the Union there are now laws al-

lowing junior lien holders as well as fee owners a year in which to redeem from execution and foreclosure sale of real estate. It is true that in other States no such equity of redemption exists. However, the provision adds nothing to the present difficulties in States which allow no redemption period, as under present conditions where present lien holders cannot sue the United States, the rights of the United States never are barred by foreclosure decree.' 74th Cong. Record, Part 6, p. 6208.

It is suggested that the problem was essentially one of appropriation of funds and it would so appear. But the United States goes on to argue that because the original provision calling for postponement of the foreclosure sale was omitted that Congress rejected any equitable right of redemption in the Federal Government, favoring instead a redemption from the sale itself, and the legislative statement is said to indicate that the latter safeguard was modeled on statutes in some 21 states providing for 'statutory redemption.'\*547 Implicit in this interpretation is that only in those 21 states could the United States be made a party to foreclosure proceedings under section 2410(c).

We do not think the statute was intended to be so restricted. The statute applies to quiet title actions and foreclosure proceedings, to lienors both senior and junior to the position of the United States, and both state and federal courts are proper forums. Subsection (c) announces at the very outset that 'A judicial sale in such action or suit shall have the same effect respecting the discharge of the property from liens and encumbrances held by the United States as may be provided with respect to such matters by the local law of the place where the property is situated.' This is not restrictive language. Furthermore, statutes permitting redemption from sale generally recognize a right of redemption\*\*885 in junior lienors, Durfee & Doddridge, supra, 23 Mich.L.Rev., at 835-836, hence the creation of such a right under section 2410(c) would be superfluous under the restrictive interpreta-

tion argued for.

[7] We conclude that the statute neither adopts the intricate machinery of statutory redemption nor does the sovereign's consent depend upon the existence of such machinery under state law. Consent is dependent upon state recognition of the federal right of redemption within one year after the foreclosure sale, but the amount necessary to effectuate the right is governed by the *Lex rei sitae*. We recognize the federal right and will give it effect where a sufficient tender is made within the time prescribed by section 2410(c). Cf. Miners Sav. Bank v. United States, 110 F.Supp. 563 (D.C.M.D.Pa.1953).

[8] The trial court by its order has discharged the lien of the United States upon the property involved because the sum tendered in exercise of the right was insufficient. Cf. Keiler v. Bunn, 84 N.J.Eq. 519, 94 A. 402 (Ch.1915). The tender was made in good faith and was based upon a construction of 28 U.S.C.A. s 2410(c) which the United States Attorney deemed correct. It would thus seem equitable and proper that the United States be given a period of 30 days \*548 from the issuance of the mandate herein to petition the Superior Court, Chancery Division, to determine the full amount due the first mortgagee or its assignee which is necessary to redeem the premises and to make tender thereof.

In this latter respect the order of the trial court is so modified and as modified, the judgment is affirmed.

No costs will be taxed to any party.

For modification and affirmance: Chief Justice VANDERBILT and Justices HEHER, WACHENFELD, BURLING and JACOBS-5.

For reversal: None.

N.J. 1956.

First Nat. Bank & Trust Co., Woodbury v. MacGarvie

126 A.2d 880

22 N.J. 539, 126 A.2d 880, 57-1 USTC P 9262, 50 A.F.T.R. 635

**(Cite as: 22 N.J. 539, 126 A.2d 880)**

Page 7

22 N.J. 539, 126 A.2d 880, 57-1 USTC P 9262, 50

A.F.T.R. 635

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