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INTRODUCTION

When co-owners[1] of real property have different sets of creditors, and when one of those creditors forecloses, the redemption rights of all the creditors must be sorted out in the foreclosure process. Although several recent Colorado appellate court decisions have addressed this difficult issue, their inconsistent results reflect a conflict between two fundamental principles of real property, and suggest the time has come for the General Assembly to overhaul the redemption statute to provide clearer guidelines on partial redemption.

Here is the typical partial redemption example: H and W own undivided half interests in Blueacre. Bank 1 is the beneficiary of a purchase money deed of trust on all of Blueacre, securing the purchase money note which H and W both signed. C is a judgment creditor of H only,[2]

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* Shareholder and Director, Mosley, Wells, Johnson & Ruttum, P.C., Denver, Colo.; University of Colorado, J.D. (1977), B.A. (1974).

1. The term "co-owners" is used in this article to include both joint tenants and tenants in common, two of the three basic kinds of co-owners of real property. *See generally* 2 D. NILES & W. WALSH, AMERICAN LAW OF PROPERTY §§ 6.1-6.6 (1952); 4A POWELL ON REAL PROPERTY § 599 (Castleman rev. 1989); 4 J. GRIMES, THOMPSON ON REAL PROPERTY §§ 1770-1773 (repl. ed. 1979). The third form of co-ownership—tenancy by the entirety—was either abolished in Colorado long ago by the Married Women's Acts, COLO. REV. STAT. §§ 14-2-201-210 (Repl. Vol. 1987), or is now so indistinguishable from joint tenancy as to not warrant separate description. *Compare* Whyman v. Johnson, 62 Colo. 461, 163 P. 76 (1917) and 2 D. NILES & W. WALSH, AMERICAN LAW OF PROPERTY § 6.6 n. 34 (1952) (listing Colorado as one of eight states abolishing tenancy by the entirety, and citing *Whyman* as authority) *with* Marsh, *Tenancy by the Entirety in Colorado*, 13 COLO. LAW. 230 (1984) (in which Professor Marsh suggests that such a reading of *Whyman* is incorrect, and that a tenancy by the entirety can still be created in Colorado by express provision in a deed).

In any event, none of the cases has to date suggested that the issue of partial redemption should be examined differently for one type of co-ownership than for another.

2. That is, C's judgment is not within the scope of the family purpose doctrine, codified at COLO. REV. STAT. § 14-6-110 (1987 Repl. Vol.), under which C's judgment lien, if based on an obligation for "the expenses of the family [or] the education of the children," would reach *both* H's and W's interests in Blueacre.

An additional foreclosure complication which this hypothetical ignores is presented by the Colorado Homestead Act, COLO. REV. STAT. §§ 38-41-201-211 (Repl. Vol. 1982). That Act in effect immunizes from execution the first $20,000 of equity in the family homestead, and requires an executing creditor to comply with a series of procedures (including appraisals) designed to prove the existence of this equity cushion as a condition of execution.

In Frank v. First Nat'l Bank, 653 P.2d 748 (Colo. App. 1982), the Colorado Court of Appeals not only held that the Homestead Act applied to public trustee foreclosures, but also held that the homestead waiver contained in the typical form deed of trust was ineffective to waive the homestead exemption vis-a-vis a third-party bidder at the foreclosure sale. The apparent result of *Frank* was that any third-party bidder would have to bid at least $20,000 more than the amount of the foreclosing creditors' lien, even though the foreclosing creditor himself had obtained a waiver of the homestead.

The General Assembly quickly overruled *Frank*, by providing that a homestead waiver

and has a judgment lien on H's undivided half interest in Blueacre junior to Bank 1's interest.[3] Bank 2 is the beneficiary of a second deed of trust on all of Blueacre, securing a second note which H and W both executed after C's judgment lien was perfected.[4] When Bank 1 forecloses, may (or must) C redeem the *entire* interest in Blueacre (even though C has only a lien on H's half interest), and thereby force Bank 2 to redeem the entire interest from C, or may (or must) C redeem only his partial interest?

Similar difficulties arise when the partial interest results not from undivided co-ownership but rather from creditors of a single owner having different interests in different parcels of real property: A owns Parcel 1 and Parcel 2. Both parcels are encumbered by a single first deed of trust, and Parcel 1 is encumbered by a second deed of trust. When the beneficiary of the first deed of trust forecloses, must the beneficiary of the second deed of trust redeem the entire property from the sale, or can he somehow apportion the sale price between the parcels and redeem only his Parcel 2?

The junior redemption provisions of the Colorado foreclosure statute[5] are not nearly as clear as they could be on these questions.[6] This statutory ambiguity has allowed the appellate courts to look at these issues with an eye toward two fundamental and fundamentally conflicting sets of policies.

On the one hand, public policies favoring the maximization of foreclosure prices and the certainty and predictability of the foreclosure process led the Colorado Supreme Court to adopt a general rule against partial redemption. That is, a junior lienor with only a partial interest in the foreclosed property must nevertheless redeem the entire property from the sale, or lose his lien.[7]

On the other hand, it is a basic tenet of co-ownership that the interests of one co-owner may not be used to satisfy the debts of the other co-owner. In the case of separately encumbered parcels, it is also a basic tenet that a creditor with a lien on one piece of property cannot extend

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contained in a deed of trust is effective to waive the homestead for *any* purchaser or redeemer acquiring the property through foreclosure of that deed of trust. COLO. REV. STAT. § 38-41-212 (Repl. Vol. 1982). In so doing, however, the General Assembly codified that portion of *Frank* which held that the Homestead Act did in fact apply to the foreclosure of deeds of trust, mortgages and other consensual liens, a proposition not at all evident from the language of the two statutes. Of course, as a practical matter, *no* foreclosure of consensual liens need any longer be complicated with homestead issues, since lenders are now universally insisting on homestead waivers now that those waivers have been made fully effective by the post-*Frank* amendments.

3. Although there has been considerable controversy over this question, it is now clear that Colorado's recording statute, COLO. REV. STAT. § 38-35-109 (Repl. Vol. 1982), is a so-called "race-notice" statute. That is, the person who first records his interest without notice or knowledge of conflicting unrecorded interests, takes priority. *Cf.* Page v. Fees-Krey, Inc., 617 P.2d 1188 (Colo. 1980), holding that the predecessor to this recording statute was a "pure notice" statute.

4. Thus, Bank 2's interest is junior to C's interest. *See supra* note 3.

5. COLO. REV. STAT. § 38-39-103 (Repl. Vol. 1982 and Supp. 1987).

6. *See infra* text accompanying notes 21-27.

7. *See infra* text accompanying notes 28-37.

his lien to a second property not covered by the lien. As we will see, these basic principles have recently led the court in some limited circumstances to an interpretation of the statute allowing, and indeed requiring, partial redemption.[8]

THE REDEMPTION STATUTE

Under the current statute, the owner of foreclosed non-agricultural real estate has 75 days after the sale within which to redeem, by paying the public trustee or sheriff the sales price plus interest, taxes and other proper charges.[9] After the expiration of the owner's redemption period, lienors with interests junior to the foreclosing creditor have similar and sequential rights to redeem.[10]

An example serves to illustrate the process. Owner owns Redacre, which is encumbered with the following interests in the following priorities:

Creditor A	$200,000
Creditor B	$100,000
Creditor C	$100,000
Creditor D	$ 10,000

Creditor A forecloses, and bids in the full amount of his debt, plus various foreclosure costs, for a total of $210,000. Creditor A need not come up with any cash, since he is credited for the amount of his debt and certain proper foreclosure charges.[11] If he is the highest bidder, he

8. *See infra* text accompanying notes 38-50.

9. COLO. REV. STAT. § 38-39-102(1) (Supp. 1987). By contrast, the owner of "agricultural" real estate is allotted six months within which to redeem. COLO. REV. STAT. § 38-39-102(2)(a) (Supp. 1987). "Agricultural real estate" is by recent statutory amendment defined as property which is (1) completely unsubdivided, and (2) if located in an incorporated town or city, assessed as agricultural. COLO. REV. STAT. § 38-39-102(3)(a) (Supp. 1987). The predecessor to this statute defined "agricultural real estate" simply as any real estate which was not subdivided. COLO. REV. STAT. § 38-39-102(3)(a) (Repl. Vol. 1982). *See also* Rowe v. Tucker, 38 Colo. App. 532, 560 P.2d 843 (1977)(mining property is "agricultural" under old definition, since it was not subdivided).

In addition to the redemption distinction between "agricultural" and "non-agricultural" property, recent statutory changes have recognized a further sub-category of agricultural real estate—"agricultural residences." COLO. REV. STAT. § 38-39-102.5 (Supp. 1987). This new statute—a response to the "family farm crisis"—imposes many additional procedural and substantive conditions on the foreclosure and redemption of agricultural residences, and is beyond the scope of this article.

10. COLO. REV. STAT. § 38-39-103(1) (Supp. 1987).

11. Of course, nothing *requires* foreclosing creditors to bid in the amount of their debt. They are free to bid more or less, although each of these alternatives is fraught with varying degrees of danger.

If they bid more, they must pay the difference in cash. They will want to do this only if they believe the value of the property justifies it, and especially only if there are competing bids at the sale or a risk of junior redemption. Although competitive bidders sometime attend sales, in the author's experience virtually all foreclosure sales are attended only by the foreclosing creditor, who almost never bids in more than his debt. Indeed, foreclosure sales so seldomly involve competitive bids that the statute was recently amended to permit the foreclosing creditor to submit his bid by letter. COLO. REV. STAT. § 38-37-142 (Supp.

is issued a certificate of purchase,[12] which serves to identify him as the person entitled either to be repaid (if there is a subsequent redemption) or to be issued a public trustee's deed to the property (if there is no subsequent redemption).[13]

Assuming Redacre is "non-agricultural,"[14] Owner has 75 days after the sale within which to redeem, by paying the $210,000 in cash or certified funds to the public trustee, plus post-sale interest at the note rate, plus certain other proper post-sale charges.[15]

If Owner fails to redeem during his redemption period, Creditors B, C, and D have sequential rights to redeem, provided they have filed notices of intent to redeem prior to the expiration of Owner's redemption period.[16] Creditor B has ten days after the expiration of Owner's redemption period within which to redeem, followed by Creditors C and D, each of whom have five days.[17]

Creditor B can redeem by paying to the public trustee the $210,000 sale price plus interest and the proper post-sale charges; that is, the first junior redeemer's redemption price is exactly the same as the Owner's redemption price (plus, of course, any additional interest). And, like the Owner but unlike the foreclosing creditor, Creditor B must pay these monies to the public trustee in cash or certified funds. The public trustee then pays these funds over to Creditor A, takes back A's certifi-

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1987). Junior redemption is a similarly rare occurrence. As a result, foreclosing creditors very seldom will bid in more than the amount of their debt.

It is much more common for a creditor to bid in less than the amount of his debt, particularly in times of falling real estate prices. If the creditor believes the property is worth less than his debt, then he may bid in the lesser amount and retain the right to sue his borrower for the deficiency. (Colorado, unlike some states, does not yet have a so-called anti-deficiency statute. *Cf.* CAL. CIV. PROC. CODE § 580 (West 1976 & Supp. 1989). There are, however, dangers to which a creditor exposes himself when he bids less than the amount of the debt.

First, of course, he risks being redeemed out for the amount of his low bid, either by the owner or by junior redeemers, thus losing *all* rights to the collateral. Again, however, the realities of forced sales, and especially forced sales in a declining real estate market, mean that these risks of redemption are often more theoretical than real. This has emboldened many foreclosing creditors, who see the foreclosure as an opportunity to bid in a low price, artificially create a deficiency, and end up with both the collateral *and* a concocted deficiency against the debtor.

Courts have responded to the most egregious of these cases by stepping in and undoing the foreclosure sale. *See, e.g.*, Chew v. Acacia Mut. Life Ins., 165 Colo. 43, 437 P.2d 339 (1968); Tekai Corp. v. Transamerica Title Ins., 39 Colo. App. 528, 571 P.2d 321 (1977). Although the law in this area is not yet fully developed, the cautious foreclosing creditor should never bid in less than the amount of his debt, unless he has an appraisal justifying the bid and is prepared to defend the appraisal against an inadequacy attack. *See generally*, Johnson & Hoffman, *Inadequacy of Sales Price at Judicially Ordered Sales of Real Property*, 12 COLO. LAW. 1435 (1983).

12. COLO. REV. STAT. § 38-39-115(2) (Supp. 1987).

13. Certificates of purchase are freely assignable. COLO. REV. STAT. § 38-39-116 (Supp. 1987).

14. *See supra* note 9.

15. COLO. REV. STAT. § 38-39-102 (Supp. 1987).

16. COLO. REV. STAT. § 38-39-103 (Supp. 1987).

17. Recent amendments have clarified that these junior redemption periods are fixed in time at the expiration of the owner's redemption period; that is, an early junior redemption will *not* accelerate subsequent redemption periods. COLO. REV. STAT. § 38-39-103(2) (Supp. 1987).

cate of purchase, and issues Creditor B a certificate of redemption.[18]

Creditor C then has five days after the expiration of Creditor B's five-day period within which to redeem. Creditor C must pay the $210,000 plus proper post-sale costs plus the amount of principal and interest owed to Creditor B.[19] Thus, Creditor C must pay $210,000 plus $100,000, or $310,000, plus post-sale costs and interest. The public trustee then issues Creditor C a certificate of redemption, pays Creditor B his $310,000 and interest and costs, takes back B's certificate of redemption, and issues Creditor C a certificate of redemption.

Creditor D goes through precisely the same procedures; he must pay the $210,000 sale price plus the amounts of B's and C's liens, plus costs and interest. In our example, Creditor D must pay a total of $410,000 plus costs and interest.[20]

Though there are several unresolved issues related even to this simple redemption situation,[21] for the most part the process seems to run smoothly and without serious difficulties.

However, when the situation is complicated with co-ownership, thus raising the issue of partial redemption, the statutory scheme breaks down. That is because the statutory language on junior redemption simply does not deal, and has never dealt, with the possibility that a junior redeemer's lien encumbers less property than the lien of the foreclosing creditor, in either sense of the word "less"—less because it encumbers only an undivided interest or less because it encumbers only a divided parcel of the whole.

Consider our earlier example, but assume Creditor B's $100,000 interest encumbers only an undivided one-half interest in Redacre. If Creditor B wishes to redeem from Creditor A's foreclosure, does Creditor B have the right or obligation to redeem the entire property (by paying the full redemption price of $210,000), or does he redeem only the undivided half to which his lien attaches (by paying only one-half of the $210,000 foreclosure sale price)?

If Creditor B fully redeems by paying the full $210,000, then Creditor C and D redeem as if Creditor B were an ordinary lienor with an interest in all of Redacre; that is, Creditor C redeems by paying $310,000, and Creditor D redeems by paying $410,000. This, of course,

18. COLO. REV. STAT. § 38-39-104 (Supp. 1987).

19. COLO. REV. STAT. § 38-39-103(1) (Supp. 1987). This amount is determined by Creditor B filing, at the time he redeems, an affidavit stating the amount owed to him. COLO. REV. STAT. § 38-39-103(3) (Supp. 1987).

20. *See generally* Quail, *The Statutory Right of Redemption from Foreclosure*, 13 COLO. LAW. 793 (1984).

21. For example, the statute does not clearly indicate whether *all* prior junior lienors who file timely notices of intent to redeem must be paid off, or only those who themselves redeem. The latter interpretation seems to make most sense, and in the author's experience it is the interpretation adopted by virtually all public trustees. In his dissent in First Nat'l Bank v. Energy Fuels Corp., 200 Colo. 540, 547, 618 P.2d 1115, 1120 (1980), Justice Lohr suggests this result by stating that the junior liens that must be paid off are those that were "used to effect prior redemption." There is, however, no case directly on point, and the statutory language is also quite susceptible of the other interpretation.

means that Creditor B must come up with sufficient cash to redeem all of Redacre even though he only has an interest in half of it.

If, however, Creditor B is allowed or required to partially redeem by paying only $105,000, then he acquires a certificate of redemption only as to half of Redacre. What then are the redemption rights of Creditors C and D? The statute is not only unclear about the precise effects of partial redemption, it is, as we shall see, unclear about whether partial redemption is even permissible.

Prior to 1931, the applicable law required the redeeming lienor to pay "all redemption amounts previously paid,"[22] suggesting that even though a junior redeemer's lien ran only to a partial interest in the property, he was nevertheless required to redeem the entire property if he wished to redeem any of it.[23] Even this conclusion was of some doubt, however, given the modifying phrase in the pre-1931 version of this statute, which provided that the junior redemption was to be made "according to the priority of [the redeemer's] lien."[24] The argument is that the "priority" of a junior redeemer's partial interest is measured only with respect to that partial interest. Thus, if he has a second deed of trust only as to half of the property, he has the right to redeem only that half.

In 1931, this junior redemption language was revised to its current form:

> [E]ach subsequent encumbrancer and lienor in succession . . . may redeem . . . by paying all redemption amounts theretofore paid with interest and the amount of all such liens with interest prior to his own held by such persons as are evidenced in the manner required in this section. . . .[25]

Although this revised statutory language retains the requirement that the junior redeemer pay "all redemption amounts previously paid"—thus suggesting there can be no partial redemption—it adds the requirement that the junior redeemer also pay "all such liens with interest prior to his own held by such persons as are evidenced in the manner required by this section."[26] By referring to *prior* liens, some courts have suggested that this language, like its predecessor, means a junior lienor need redeem only from that portion of a foreclosing interest that was in fact prior to his own interest; that is, partial redemption is permissible.[27]

That conclusion seems to be quite a leap of faith, however. The obvious purpose of the addition is to clarify the situation that arises when there are multiple junior redemptions. As set forth in the earlier examples, the last junior redeemer must pay not only what the prior redeemer paid, but also must pay that prior redeemer's lien.[28] To suggest that the 1931 legislature had the idea of partial redemption in mind

22. 1929 Colo. Sess. Laws 538-39.
23. *See infra* text accompanying note 32.
24. 1929 Colo. Sess. Laws 538-39.
25. COLO. REV. STAT. § 38-39-103(1) (Supp. 1987).
26. *Id.*
27. *See infra* text accompanying notes 39-43.
28. *See supra* text accompanying notes 17-20.

any more than its predecessors did is to read quite a lot into an already ambiguous paragraph of the statute. Nevertheless, as we will see, these ambiguities—both pre- and post-1931—gave the Colorado Supreme Court just enough elbow room to address the issue of partial redemption with other policy considerations in mind.

WALKER V. WALLACE: PARTIAL REDEMPTION IS PROHIBITED

Although it had suggested the result earlier,[29] in the 1926 case of *Walker v. Wallace*[30] the Colorado Supreme Court held for the first time that a junior lienor with only a partial interest could, and in fact must, redeem the entire property if it wanted to redeem at all. *Walker* involved a foreclosing creditor of both co-owners, and a junior judgment lienor of one of the co-owners. The foreclosing creditor was the successful bidder at the foreclosure sale. The junior judgment lienor tendered the full sale price in an effort to redeem, but the foreclosing creditor refused to accept the money, arguing that the junior lienor could not redeem the entire property when he held an interest only in an undivided half.

The trial court held that the foreclosing creditor was justified in refusing the entire redemption amount, impliedly ruling that the junior lienor with only a partial interest could redeem only as to that partial interest. The Colorado Supreme Court reversed. It adopted the general rule, recognized in many other states, that in the absence of a statute to the contrary "property which has been sold in an execution sale in its entirety or en masse, if redeemed at all, must be redeemed en masse."[31]

The court looked at the statutory language then in effect—the redeemer had to pay "all redemption amounts previously paid"—and had no difficulty interpreting this language to prohibit partial redemption,[32] with the aid of an Illinois case construing an identical Illinois provi-

29. In Leach v. Torbert, 71 Colo. 85, 204 P. 334 (1922), the supreme court did not have to reach the partial redemption issue, since one of the putative junior redeemers in fact had no judgment lien which attached to the foreclosed property. However, the court permitted a second junior redeemer—who *did* have a record interest in an undivided half of the foreclosed property—to proceed with his lawsuit seeking redemption of the entire property. The case turned on procedural issues, and the court did not confront the partial redemption issue head on. However, by allowing the redeemer to proceed, the court at least suggested that he could not be forced by others to redeem partially.

30. 79 Colo. 380, 246 P. 553 (1926).

31. *Id.* at 384. The cases which the *Walker* court cited from other jurisdictions are: Tribble v. Wood, 186 Ala. 329, 65 So. 73 (1914); Oldfield v. Eulert, 148 Ill. 614, 36 N.E. 615 (1893); Sharpe v. Baker, 51 Ind. App. 547, 96 N.E. 627 (1911); Powers v. Sherry, 115 Minn. 290, 132 N.W. 210 (1911); O'Brien v. Kreuz, 36 Minn. 136, 30 N.W. 458 (1886); Martin v. Sprague, 29 Minn. 53, 11 N.W. 143 (1882).

Technically, the narrow holding of *Walker* was that a junior lienor with a partial interest could, if he wished, redeem the entire property. The *Walker* court was not faced with the issue of whether such a junior lienor *must* redeem the entire property. Thus, the quoted language indicating that partial redemption is prohibited, was actually dictum. That dictum became a holding in Chain-O-Mines v. Williamson, 101 Colo. 231, 72 P.2d 265 (1937). *See infra* note 38.

32. *See supra* text accompanying note 23.

sion.[33] It did not address the "according to the priority of his lien" language, which arguably suggests a contrary result.[34]

In *Walker* the court went on to justify its decision on broader policy grounds, namely that by prohibiting partial redemption, it was insuring that foreclosed property would be used to satisfy as many debts as possible.[35] In addition, under the facts in *Walker*, this full use of the property did not injure anyone, since the foreclosing creditor was fully repaid.[36] Unmentioned, of course, is the fact that the redeeming creditor obtained a windfall by acquiring 100% of the equity in the property (though, admittedly, he had to pay 100% of the senior debt), even though his interest attached only to fifty percent.[37]

The *Walker* rule was extended in 1937 to the partial-redemption-by-parcel situation, when the court ruled that a junior lienor as to one parcel had to redeem *en masse* as to all the foreclosed parcels.[38]

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33. Durley v. Davis, 69 Ill. 133 (1873).

34. *See supra* text accompanying note 24.

35.

> The property is thus made to pay as many debts of the judgment debtors and each of them as is possible, whereas, if Walker did not have the right to redeem the entire property of the judgment debtors, there having been no redemption by them, it would be appropriated to the payment of one only of the two debts.

Walker, 79 Colo. at 385-86, 246 P. at 555.

36.

> The plaintiff Wallace cannot possibly be injured for there has been tendered to the sheriff for his use the entire amount which he bid at the sale, with all interest and costs. . . . Nothing has been taken from him. He will receive his entire claim against these two tenants in common of the property, who were his judgment debtors.

Id. at 385.

37. For example, assume that the property had a value of $100,000, that $50,000 was owed on the first deed of trust, and $20,000 on the judgment lien encumbering only half the property. Assume also that the holder of the first deed of trust foreclosed, and was the successful bidder by biding in his full $50,000 debt. If the owner fails to redeem, then the foreclosing creditor and the judgment creditor are fighting over a substantial equity. If the judgment creditor is allowed to redeem the *entire* property by paying off the first, he acquires *all* of the equity ($100,000 in value less $50,000 to redeem less the $20,000 already owed to him, for a total of $30,000), and the foreclosing creditor acquires none of it. If the judgment creditor is allowed only to redeem the undivided half to which his lien attaches, he acquires only a small fraction of the equity ($50,000 in value less $25,000 to redeem less the $20,000 already owed to him, for a total of $5,000). Even this calculation assumes that the value of an undivided half interest in property is half of the value of the whole, an assumption of questionable accuracy: "It requires no appraisal expertise to conclude that an undivided one-half interest in a piece of real property is not worth one-half the value of the entire real property." First Nat'l Bank v. Energy Fuels Corp., 618 P.2d 1115, n.3 (1980) (Lohr, J., dissenting). If an undivided half interest is in fact worth less than one-half of the value of the whole, a partial redemption is even less attractive to the junior partial lienor.

It is this battle over equity which drives the dispute between the putative partial redeemer and other creditors with liens on the entire property.

Conversely, if there is not enough value in the property to satisfy all the debts, then the partial creditor will not want to be forced to redeem the entire property, and he and the full creditor reverse roles on this issue of whether partial redemption should be allowed and whether it should be mandatory.

38. Chain-O-Mines v. Williamson, 101 Colo. 231, 72 P.2d 265 (1937). This case involved an option to purchase a portion of a group of mining claims. Citing *Walker*, the court refused to allow the redemption of a portion of claims from a foreclosure of the entire group.

FIRST NATIONAL BANK V. ENERGY FUELS CORP.: PARTIAL REDEMPTION IS REQUIRED

The Colorado Supreme Court did not have another opportunity to examine the question of partial redemption until 1980, when it decided *First Nat'l Bank of Southglenn v. Energy Fuels*.[39] In that case, a husband and wife owned their residence in joint tenancy, and had executed a first deed of trust for the benefit of an unnamed bank (Bank 1). Energy Fuels was a judgment creditor of husband only, and perfected a judgment lien against husband's interest in the property, junior to Bank 1's interest. After that perfection, husband and wife executed a second deed of trust on the property for the benefit of Chatfield Bank, and then a third deed of trust on the property for the benefit of First National Bank.

Bank 1 foreclosed, was the successful bidder at the sale, and acquired a certificate of purchase to the property. Energy Fuels, Chatfield, and First National Bank all filed timely notices of their intent to redeem, and each deposited with the public trustee amounts sufficient to redeem the entire property from Bank 1.

The public trustee, in accordance with the holding of *Walker*, concluded that Energy Fuels had the first right (and, indeed, obligation if it wanted to redeem at all) to redeem the entire property even though its lien attached only to husband's undivided half interest. Chatfield filed suit in the district court, arguing for partial redemption—that is, that it had the first right of redemption with respect to wife's half interest, and that Energy Fuels had the first right of redemption only with respect to husband's half interest.

The district court agreed with Chatfield, and Energy Fuels appealed. The court of appeals, also relying on *Walker*, held that no partial redemption was permissible, let alone required, and that Energy Fuels had the first right of redemption with respect to the entire property.[40]

The Colorado Supreme Court, in an opinion by Justice Erickson and with a dissent by Justice Lohr, reversed the court of appeals, holding that the redemption rights were to be prioritized as to each undivided half interest. It distinguished *Walker* on this key fact: In *Walker*, there were no lienors junior to the redeeming partial lienor. Therefore, no one was injured by the partial lienor's full redemption (except, as discussed above, in not obtaining the equity windfall).[41] In the *Energy Fuels* case, however, if Energy Fuels were allowed to redeem the entire interest, the subsequent lienors—Chatfield and First National Bank—would be forced to redeem the entire interest, and this would have the indirect result of using wife's half interest in the property to pay husband's judgment (assuming, of course, that the amount of the judgment against husband was more than the value of husband's undivided half interest in the equity in the property).[42]

39. 618 P.2d 1115 (Colo. 1980).
40. Chatfield Bank v. Energy Fuels Corp., 42 Colo. App. 233, 599 P.2d 923 (1979).
41. *Energy Fuels*, 618 P.2d at 1119. *See supra* note 37 and accompanying text.
42. For example, assume that the property was worth $200,000 (that is, each undi-

The Court also distinguished *Walker* on the basis of the statutory change in 1931, emphasizing the added phrase "and the amount of all such liens prior to his own." The majority concluded that this language suggested the redeeming lienor could *not* redeem the entire property, since the foreclosing creditor's lien was "prior" only to an undivided half of the redeemer's lien.[43]

Justice Lohr's dissent attacked the majority opinion both as a matter of statutory interpretation and on policy grounds. He emphasized the first phrase of the redemption provision—"pay all redemption amounts"—and quite correctly pointed out that the second phrase was obviously added merely to address the situation of multiple junior redemption, and not to permit partial redemption.[44] He also invoked the general rule announced in *Walker* that partial redemption should not be allowed in the absence of clear statutory authority otherwise.[45] Finally, while conceding that a "no partial redemption" rule can in some circumstances do violence to the common law precept that the property of one co-owner cannot be used to satisfy the debts of the other co-owner,[46]

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vided half was worth $100,000), that Bank 1's purchase money note had a balance of $100,000 at the time of the sale, that Bank 1 successfully bid the full $100,000 at the sale, and that the amount of Energy Fuel's judgment against H was $75,000 at the time of the sale. If Energy Fuels were allowed to redeem the entire property from Bank 1's purchase, then Chatfield could redeem from Energy Fuels for $175,000 ($100,000 to Bank 1; $75,000 to Energy Fuels). If that happened, then $50,000 of each of H's and W's interest would have gone to pay Bank 1, and $37,500 each would have gone to pay Energy Fuels. Thus, a significant portion of the value of W's undivided interest ($37,500 out of $50,000) would have gone to pay H's debt to Energy Fuels.

The *Energy Fuels* court correctly recognized that the existence of a lienor junior to the redeemer raised the possibility of this inequity, and distinguished *Walker* on that basis: "*Walker* concerned only one creditor seeking to redeem. This case involves competing lienholders who each possess a superior lien on separate interests of real property held in joint tenancy." 618 P.2d at 1119.

However, as discussed in more detail in note 63 *infra* and in the text accompanying notes 64-66 *infra*, the majority opinion is a bit disingenuous in describing this problem as "using wife's property to pay husband's debts." By the time partial redemption becomes an issue, the owners' redemption period has already expired, and neither husband nor wife has any interest in, let alone any equity in, the property. Any "inequity" lies in giving this windfall to husband's creditor instead of the joint creditor, and this may not be inequitable at all. *Id.*

43. "The applicable redemption statute in 1926 was markedly different from section 38-39-103(1), C.R.S. 1973." *Id.* at 1119. Footnote 5 states, "Section 5951, Compiled Laws of Colorado 1921 stated that the redeeming lienor must only pay 'the amount of money for which said premises shall have been sold.' Section 38-39-103(1), C.R.S. 1973, requires this lienor to also pay the 'amount of . . . liens . . . prior to his own.' This 'prior to his own' language forms the basis of our decision and was not present in *Walker*." *Id.*

44. *See supra* text accompanying note 28.

45. "Although statutory content governs the results of statutory redemption cases, it is worthy of note that the general rule is 'that a mortgage is an entire thing, and must be redeemed as such, and that the mortgagee cannot be compelled to divide his debt and his security'." 618 P.2d at 1121 (Lohr, J., dissenting, quoting 9 G. THOMPSON, COMMENTARIES ON THE MODERN LAW OF REAL PROPERTY 745 (1958)).

46.

> The majority correctly points out that to [deny partial redemption] utilizes Kathleen Pickering's property to reduce Ben Pickering's debt. However, the construction adopted by the majority leads to other problems not raised as issues in this case.

Id. at 1121.

Justice Lohr articulated two policies which disfavored partial redemption: maximizing foreclosure prices (a policy recognized by the *Walker* court) and the policy of maintaining certainty and predictability in foreclosure proceedings.

The policy of maximizing foreclosure prices is a longstanding one, which the majority rule allowing partial redemption undoubtedly damages. Foreclosure prices—already depressed by the realities of forced sale—will feel even more downward pressure as foreclosing creditors face the harrowing prospect of waking up one day with an uninvited coowner. Lenders may even be less willing to make real estate loans at the outset. It is difficult enough for secured lenders to minimize bad loan losses through foreclosure, let alone to have to try to cut those losses by selling undivided interests.

However, Justice Lohr does not explain in any detail why the majority's rule requiring partial redemption in these circumstances introduces any special uncertainty or unpredictability in the foreclosure process. True, when a creditor takes a lien encumbering only part of a piece of real property (either an undivided interest in all the property, or an interest in a separate parcel), he has no way of knowing at that time whether junior lienors as to all of the property might come along. If they do, *Energy Fuels* says our creditor will not be able to redeem the entire property from foreclosure by a senior creditor. If they do not, *Walker* says our creditor *must* redeem the entire property. This undoubtedly puts our creditor in a somewhat uncertain position. However, this uncertainty can be avoided entirely, at least in the single parcel situation, if our creditor takes his security interest in *all* of the property. True, some lienors (such as judgment lienors) have no choice but to take their interest in only a part of the property, but the very fact that these kinds of involuntary lien creditors have no choice means any uncertainty about the value of their liens will have little or no commercial impact at the outset of transactions. This author is not aware of any lenders who intentionally and regularly make loans collateralized by undivided interests in real property. Indeed, almost all of the significant Colorado cases on partial redemption, not surprisingly, have involved a redeemer whose partial interest arose by way of an involuntary lien. Under these circumstances, it is difficult to imagine how a rule requiring partial redemption will cause any special uncertainty in the foreclosure process.

Moreover, the identity of all junior lienors is fixed at the expiration of the owner's redemption period,[47] so our creditor will know before he tenders his redemption amount whether he may redeem the whole property or only his portion. Thus, any uncertainty disappears before the junior lienor must make his decision to redeem.

Finally, in view of several fundamental questions which still abound in the area of junior redemption—including, for example, what the redeemer must pay and to whom[48]—it is hard to imagine that partial re-

47. COLO. REV. STAT. § 38-39-103(2) (Supp. 1987).
48. *See supra* note 21.

demption will introduce any more uncertainty than is already currently embedded in the redemption process.

Justice Lohr's statutory construction argument is much more difficult to avoid. Even if it cannot be said that the current statute unequivocally prohibits partial redemption, it certainly does not unequivocally mandate it. The fact is that the statute is hopelessly ambiguous on this issue, as it is on many other redemption issues. These ambiguities were not eliminated by the 1931 amendments, but in fact in some ways may have been exacerbated by them.[49]

Before *Energy Fuels*, the law in Colorado and elsewhere was that partial redemption would not be allowed absent a clear statutory directive. This was the touchstone of the *Walker* case. Although Justice Erickson's opinion in *Energy Fuels* may make good policy sense, it seems to do considerable violence to the *Walker* precedent recognizing a built-in presumption against partial redemption. Perhaps Justice Lohr's complaint of "uncertainty and unpredictability" was aimed not at the notion of partial redemption itself, but at the deeper target of the court's own failure to respect its precedent in this area.

In any event, one might at least argue that *Energy Fuels* settled this matter of partial redemption once and for all by drawing a clear line between the circumstances when one may only partially redeem, and when one must redeem the entire property. As two recent cases have demonstrated, however, this line is not nearly as clear as it might seem.

THE GRAY AREA

Once the *Energy Fuels* Court let the genie of partial redemption out of the bottle, it soon became evident that the endless variety of foreclosure conditions would raise endless questions of exactly where the *Walker* rule ends and the *Energy Fuels* exception begins.

For example, in *Sant v. Stephens*[50] the federal district court was faced with a redemption issue complicated by the fact that separate foreclosure proceedings were commenced against the same property. The holder of a deed of trust on co-owned property began the first proceeding, foreclosing on the entire property, and the holder of a second deed of trust encumbering only an undivided half interest in the property commenced a second foreclosure only as to that undivided half. The sale on the partial interest took place before the sale on the entire interest, presumably because the full foreclosure sale was continued. A municipality held a statutory lien for unpaid utility assessments as to the entire property,[51] and its assignee did not redeem from the foreclosure on the partial interest, but did redeem from the foreclosure on the entire property. An understandably befuddled public trustee issued a pub-

49. *See supra* text accompanying notes 25-27 .

50. 580 F. Supp. 1003 (D. Colo. 1983).

51. One of the critical issues in the case was whether this kind of statutory lien did in fact give rise to a right of junior redemption. The Colorado Supreme Court ultimately ruled that it did. Sant v. Stephens, 753 P.2d 752 (Colo. 1988).

lic trustee's deed on all of the property to the redeemer from the full sale, followed a few days later by a public trustee's deed on an undivided half of the property to the third-party bidder at the partial sale. The redeemer sued.

The federal district court ruled that by failing to redeem from the partial foreclosure sale (which, remember, occurred *before* the foreclosure sale on the entire property), the redeemer somehow lost his right to redeem from the second sale on the entire property.[52] The redeemer appealed, and the Tenth Circuit certified the question to the Colorado Supreme Court. In an opinion written by Justice Lohr, the Colorado Supreme Court ruled that there was no such waiver.[53]

Exactly how does *Energy Fuels*, which was cited extensively in Justice Lohr's majority opinion, help decide this waiver issue? At first blush, *Energy Fuels* seems entirely inapposite to either of the foreclosure sales in *Sant*. The partial interest which was foreclosed was never redeemed and the entire interest which was foreclosed was redeemed by a junior lienor holding an interest in the entire property. Partial redemption was never an issue in either sale.

Nevertheless, the policies discussed in *Energy Fuels* are at the heart of the dispute in *Sant*, although not in the guise of partial redemption. If we say the junior redeemer in *Sant* waived his right to redeem from the second full sale by failing to redeem from the first partial sale, then what we are really saying is that a lienor with an interest in all of the property *must* redeem from a foreclosure on a partial interest. If we require that, then under certain circumstances of valuation we would be using the property of one co-owner to pay the debts of another, in violation of the sacred principle articulated in *Energy Fuels*.

The majority in *Sant* incanted this principle as a justification for its holding that there was no waiver.[54] Chief Justice Quinn acknowledged this policy in his *Sant* dissent, but asserted the competing policies of "maximizing the price obtained at a foreclosure sale . . . and bringing about certainty and predictability to foreclosure proceedings."[55] Sound familiar? We have in *Sant* the same old battle lines that were drawn in *Energy Fuels*, with the interesting twist that Justice Lohr, the *Energy Fuels* dissenter, is now taking the *Energy Fuels* majority at its word and extending the principles of *Energy Fuels* to the multi-foreclosure situation presented in *Sant*.

If there is anything clear from the two opinions in *Sant*, it is that the court is still struggling with the very difficult issue of when the general policy respecting separate co-ownership of real property gives way to more specific policies related to the foreclosure process.

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52. Sant v. Stephens, 580 F. Supp. 1003 (D. Colo. 1983).

53. 753 P.2d 752 (Colo. 1988).

54. "The district court's holding in this case requires a lienholder on all interests in the property to redeem from a sale of an undivided interest, and this essentially uses the interests of two cotenants to satisfy the creditor of one." *Id.* at 759-60.

55. *Id.* at 763 (Quinn, J., dissenting).

Perhaps an even more striking example of this struggle is the recent court of appeals case of *Pheney v. Western Nat'l Bank*.[56] In that case, the owner of 700 acres of real property, secured by a first deed of trust to Western, divided the acreage into three different parcels and sold each parcel to different buyers. The sales were each subject to the first deed of trust. One of the parcels became encumbered with a second deed of trust for the benefit of M, and another became encumbered with a second deed of trust for the benefit of P.

Western foreclosed and obtained a certificate of purchase for all 700 acres by bidding in the full $525,000 owed to it. M (who, remember, had an interest encumbering only one parcel) gave the public trustee notice of his intent to redeem the entire 700 acres, and tendered the full sales price. P (whose interest also only encumbered one parcel) simultaneously gave notice of his intent to redeem only his 90 acre parcel, and proposed to tender $90,000 for that partial redemption on the theory that the market value of his parcel was only $90,000. The public trustee refused to let P partially redeem and P sued.

The trial court agreed with the public trustee, and the court of appeals affirmed. In its opinion, the court of appeals says several interesting things about *Walker* and *Energy Fuels*, including the statement, rather bold for an intermediate appellate court, that the *Energy Fuels* exception is "facially inconsistent with the statutory requirement that a redeemer must pay the full amount paid at the foreclosure sale."[57]

More particularly, the court of appeals identified two reasons for declining to extend *Energy Fuels* to the situation before it: (1) the competing lienors are not co-owners, since they own separate parcels, and therefore *Energy Fuels*' concerns about having the property of one co-owner pay the debts of the other co-owner do not apply;[58] and (2) to allow partial redemption in this situation requires some determination of the portion to be partially redeemed—that is, presumably some valuation of P's 90 acres as compared with the entire 700 acres.[59]

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56. 762 P.2d 693 (Colo. App. 1988), *cert. denied* October 11, 1988.

57. *Id.* at 695-96.

58.

> While the nature of the interest held by one joint tenant might well mandate that the interest of the other tenant be protected from an involuntary encumbrance, we can discern no comparable consideration where, as here, joint tenants are not involved. On the contrary, in this particular case the encumbrance was voluntarily created with full knowledge that a superior encumbrance had been previously created and foreclosed.

Id. at 696.

59.

> [T]o determine the value of the 90 acres that are encumbered by plaintiff's lien, in comparison to the entire 700 acres foreclosed upon, would require the consideration of evaluation information, which is ofttimes conflicting and contradictory. In our view, a public trustee is ill-equipped to render such evaluation judgments.
>
> Moreover, we can find nothing in the statute that would justify requiring a foreclosing creditor, who purchases at the sale, to be subjected to the peril of such an official's undervaluation of that part of the property for which redemption is sought.

Id.

The court's concerns about the mechanics of valuation are certainly well taken. How is the apportionment between the redeemer's parcel and the entire property to be made? Who is to make this valuation, and on what possible basis? The public trustee cannot make such a determination, nor can the Rule 120 court under the currently simplified procedures. Clearly, the statutory scheme is not structured to handle this valuation inquiry, and to infect the process with this issue would convert almost all foreclosures in which there are partial redeemers into full-blown litigation.[60]

However, the court of appeals' distinction between co-owners of one property and a single owner of multiple parcels is more difficult to understand. As mentioned above, if it is a basic tenet that one co-owner's property not be used to pay another co-owner's debt, then it is also a basic tenet, and perhaps even more basic, that a lien limited to one parcel of A's property does not attach to another of A's parcels, especially when A sells these parcels off to different buyers.[61] For example, in the *Pheney* situation, if P were allowed to redeem the entire 700 acres, if P's debt of $70,000 were greater than his equity in his parcel, and if M were forced to redeem the entire property for $595,000, then the situation is identical to *Energy Fuels*. A's debt to P is being paid with M's collateral.

Perhaps the *Pheney* court is telling us that it simply views *Energy Fuels* as giving more protection to co-owners of one property than to successors of a single owner of multiple parcels. But that message is certainly not clear and its rationale is even less clear. In both situations, junior partial interests are created, voluntarily or involuntarily, after a senior interest in the entire property is in place. In both situations, allowing partial redemption protects one co-owner from having his property used to pay debts of the other co-owners. There does not seem to be any reason why the parcel owner in *Pheney*—who admittedly took title with knowledge of the all-encompassing senior debt, but without knowledge of or control over whether the other owners further encumbered their parcels—should be given any less protection than the husband and wife in *Energy Fuels*—who likewise acquired their joint interests with knowledge that the property was fully encumbered (by the purchase-money mortgage they themselves gave) and with equal inability to control subsequent encumbrancing of the other's undivided interest.

In any event, the one message the court of appeals panel has clearly sent in *Pheney* is that it intends to construe the *Energy Fuels* exception as narrowly as possible.[62]

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60. Of course, where the partial redemption issue arises out of *undivided* co-ownership, as opposed to ownership of divided parcels, this valuation problem is not presented.

61. *See supra* text accompanying notes 7-8.

62. The court of appeals has recently reaffirmed its holding in *Pheney* by summarily dismissing a partial redemption argument in the context of multiple parcels. Describing the *Energy Fuels* exception as applying only to a "joint tenant's undivided interest in the property," the court of appeals has again refused to allow partial redemption of a separate parcel. Stan Miller, Inc. v. Breckenridge Resort Assoc., Inc., 779 P.2d 1365, XIII Brief

CONCLUSION

After considerable and deft waffling on the issue, the supreme court seems to have settled on the general rule that partial redemption is *prohibited* where there are no lienors junior to the partial redeemer in question, but that it is *required* where there are such junior lienors. Although there is some doubt about whether the statutory language allows the court this kind of policy-making, the decision which the court did make in *Energy Fuels* seems to be a sensible accommodation of several complex issues, if one accepts the court's premise that to require full redemption in some circumstances would do an injustice to one of the co-owners.[63] However, that accommodation is by no means complete. For example, is the rule the same for co-owners as it is for owners of separate parcels? Should it depend on whether the junior partial interest was voluntarily or involuntarily created?

It is time for the General Assembly to resolve these questions. As has been suggested, it should probably make no difference whether the partial interest is the result of undivided co-ownership of a single parcel, or multiple ownership of divided parcels. The policy issues in both situations are precisely the same, although if partial redemption is to be permitted in the case of multiple ownership of separate parcels, a valuation mechanism will have to be created.

Nor should it make any difference whether the junior partial interest was created voluntarily or involuntarily. After all, it is the *other co-owner*, the one who did *not* further encumber his interest, who we are purportedly protecting by allowing partial redemption.[64] It should not matter whether his co-owner voluntary or involuntarily encumbered his interest. In either case the rule of *Energy Fuels*, if applied at all, should be applied to prevent one co-owner's property from being used to pay the other's debts, whether or not those debts are secured with consensual or non-consensual liens.

All of this leads to one of two conclusions: either *Energy Fuels* should be abandoned in its entirety, and the no-partial redemption rule of *Walker* applied with no exceptions, or *Pheney* is wrong, and the *Energy Fuels* exception should be applied in any case where there is a redeemer junior to the partial redeemer. It probably matters more that the General Assembly adopt one or the other of these alternatives, and resolve this question, than that it adopt one particular alternative versus the other. If the values of maximizing foreclosure prices and respecting the *Walker* precedent together outweigh the policy against *the mere possibility* of having the property of one co-owner used to pay the debts of another co-owner, and it seems a good legislative case for this proposition can

Times Reporter 237 (Colo. App. 1989). The supreme court granted certiorari on September 11, 1989, and at press time the matter is being briefed.

63. *But see* note 42 *supra* and the text accompanying notes 65-66 *infra*, suggesting that the relative rights and expectations of the co-owners is never an issue by the time a partial redemption is contemplated.

64. *But see* notes 42 and 62 *supra*.

be made, then *Energy Fuels* should be abandoned, and *all* partial redemption should be prohibited. That solution would also avoid the difficult valuation questions which would be created by an extension of the *Energy Fuels* doctrine to the separate parcel situation.

Perhaps the lower courts' reluctance to extend the *Energy Fuels* exception reflects a well-justified skepticism not only with the mechanical problems which wide-spread partial redemption would introduce, but also with its underlying policies.

Is it necessarily true that in the *Energy Fuels* situation the failure to allow a partial redemption would, as the court claimed and even as the dissent acknowledged, cause wife's property to be used to pay husband's debt? No.

Remember, this "inequity" arises only when the value of husband's half interest is not sufficient to pay both the husband's debt and his share of the joint debt. It also arises only after the expiration of the husband and wife's redemption period. If wife wishes to protect her undivided half interest from husband's sole debt, she need only redeem from the foreclosure. Such a redemption would restore completely the equity in her half interest, and keep that equity insulated from husband's sole creditor.

It is thus not accurate at all to say that *Energy Fuels* involved a risk of using wife's property to pay husband's debts. By the time the partial redemption issue was raised in that case, as in any partial redemption case, both husband and wife had already lost all of their equity by failing to redeem. Therefore, the fight there was not between joint owners, but between the joint owners' creditors, namely between their joint creditor on the one hand and husband's creditor on the other.[65] Moreover, the fight is not even about which creditor should be paid in full, since by assumption there is enough value to pay everyone. The fight is over which creditor gets the equity windfall.

It is not at all self-evident that it is "inequitable" to give this windfall to husband's creditor rather than to the joint creditor. On the contrary, in any ordinary foreclosure situation, without the complication of partial redemption, the most junior redeemer *always* has the last chance to acquire any equity windfall because he has the last chance to redeem. There do not appear to be any intrinsic reasons to depart from this rule simply because the junior redeemer's lien happens to encumber only a part of the property.

Moreover, as mentioned above,[66] to permit partial redemption in any circumstance is to subject all lenders to the terrible possibility of having ownership in their collateral split by a junior partial redemption. That prospect certainly will do damage to original lenders' expectations, and will undoubtedly raise the cost of jointly borrowed purchase money.

In addition to these policy difficulties, partial redemption raises

65. *See supra* note 42.
66. *See supra* text accompanying notes 46-47.

many mechanical problems not yet addressed by the cases. For example, what if *both* co-owners have individual partial creditors, and *both* partial creditors wish to redeem their partial interests from a foreclosure of the whole? How is this situation complicated further if there is a lienor junior to both of them, but whose lien encumbers the whole? Exactly what are the applicable redemption periods, and when do they run?[67]

Unless and until the legislature acts, considerable controversy will remain over where the no-partial-redemption rule ends and its exception begins. In the end, perhaps the best way to resolve this difficulty is for the General Assembly to eliminate the *Energy Fuels* exception entirely and to return the law of foreclosure to the predictable and long-standing rule of no partial redemption.

67. The most senior junior lienor has ten days to redeem, followed by subsequent lienors each with five days. *See supra* text accompanying notes 15-20. If partial redemption is allowed, then lienors may be senior as to one undivided half of the property, but junior as to the other, requiring the public trustee to keep track of parallel sets of redemption periods.