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Foreclosures by the Public Trustee

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FORECLOSURES BY THE PUBLIC TRUSTEE

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WE are indebted to Mr. Mortimer Stone of Ft. Collins for his challenge of foreclosures by the public trustee at the April meeting of the Denver Bar Association. Mr. Stone has caused us to think and to investigate; and although I, personally, have arrived at very different conclusions from his, I am grateful that he brought up the subject, just because he did make me investigate.

Mr. Stone's conclusion seemed to be that a title passing through a public trustee contains possible elements of uncertainty. For convenience I will divide my answer into several parts.

I.

Elements of Uncertainty in Every Title

Even if there were elements of uncertainty in a title passing through a public trustee, still that, of itself, would not be sufficient ground to warrant giving up the practice of foreclosure by the public trustee. In every title it is axiomatic that the following, among other possible uncertainties, exist:

(a) Forgery;

(b) Insanity of grantor;

(c) Minority of grantor.

We have tried to bring about some protection against forgery by having deeds acknowledged; but the bond of a Notary Public is only $1,000 which would not form adequate protection in most transactions. In cases of insanity and minority, a buyer would have no protection except a possible suit for a money judgment, as he would acquire no lien on the property purchased. In the case of a foreclosure by the public trustee, however defective, the buyer would at least become an equitable assignee and have a lien on the foreclosed property to the extent of the amount of the trust deed. This fact alone gives the purchaser at a sale by the public trustee substantial protection.

II.

COURT FORECLOSURES HAVE DISADVANTAGES

The alternative for foreclosure by the public trustee is foreclosure in court; but a court foreclosure has the following disadvantages:

(a) Extra cost;

(b) Extra delay;

(c) The uncertainty of service of process.

In perhaps a majority of cases where foreclosure is necessary, there has been an abandonment of the property, so a court foreclosure must depend on constructive service of process in many cases. The whole subject of constructive service of process is not free from uncertainty.

In *Gibson v. Wagner,* 25 C. A. 129, our Court of Appeals held a court decree to quiet title defective because of the particular wording of an affidavit for publication. Our Supreme Court, later, in *Hanshue v. Investment Co.,* 67 Colo. 189, held a court decree to be valid under an affidavit for publication with exactly the same wording. This brought me the humiliation attendant upon the fact that I had rejected the title to perhaps a dozen tracts of land, basing such rejection on the decision in the Gibson case, which titles later became good under the Hanshue decision.

III.

OUR COLORADO COURTS FAVOR REMEDIAL TITLE LEGISLATION

The Public Trustee act falls into the class of remedial title legislation. In the case of the Torrens title act, another piece of remedial legislation, our Supreme Court has gone very far in sustaining the remedial legislation.

White v. Ainsworth, 62 Colo. 513

A registration of land under the Torrens Act was sustained, even against minor heirs, not actually served, where the statutory provisions had been complied with.

IV.

PRESUMPTION IN FAVOR OF OFFICIAL ACTS

Mr. Stone cited a number of Colorado cases to the effect that there is no presumption in favor of the regularity of the acts of a trustee; but on examination of these cases it develops that each of such decisions was rendered in regard to a private trustee acting under a deed of trust given prior to 1894 when the Public Trustee act was adopted.

The public trustee is a public official and we are all familiar with the rule that the regularity of the acts of a public official are presumed. Our Supreme Court has recognized this rule in the following cases:

Colorado Fuel Co. v. Maxwell Co. 22 Colo. 71, survey of public land officials.

Colo. Fuel & Iron Co. v. State Land Board 14 C. A. 84, regularity of meeting of Land Board.

Cofield v. McClelland 1 Colo. 370, 16 Wall. 331, notices by the Probate Judge concerning the Denver townsite.

V.

COLORADO DECISIONS SPECIFICALLY ON FORECLOSURES BY PUBLIC TRUSTEES

So far we have been considering the subject generally. We will now take up the specific Colorado decisions under our Public Trustee act.

Healey v. Zobel, 45 Colo. 294, 101 Pac. 56

A trust deed and the foreclosure under it were sustained although:

(a) The trust deed ran to the "Public Trustee" without specifying the county;

(b) The trust deed did not specify the period of advertisement; the Court holding that in such a case the advertisement should be for a reasonable period.

Watkins v. Booth, 55 Colo. 91

Foreclosure of first trust deed by Public Trustee. Notice to holder of second trust deed mailed to it at address given in its trust deed although parties in charge of foreclosure knew that its address had changed and failed to call the attention of the Public Trustee to this change. Foreclosure sustained.

Clark v. Duvall, 61 Colo. 76

Foreclosure by Public Trustee. Notice defective by leaving out "feet" in description of land. Before the foreclosure Weld County by legislative action had been added to those counties where the Governor appoints the Public Trustee. No appointment had yet been made.

Court sustained the foreclosure, holding description sufficient and that the County Treasurer held over until a new Public Trustee was appointed by virtue of Section 1 of Article XII. of the Constitution providing:

"Every person holding any civil office under the state or any municipality shall, unless removed according to law, exercise the duties of his office until his successor is duly qualified."

VI.

CONCLUSION

The one point in which the writer agreed with Mr. Stone was concerning the statute regarding foreclosure where the maker of the trust deed or the person liable on the indebtedness had died. This statute, as it stood when Mr. Stone spoke, required permission of court or court foreclosure within one year of such death; and in examining a title there would be no way to learn of such death. Fortunately, however, since Mr. Stone made his address, our legislature, by enacting Senate Bill 113, Session Laws 1931, cured this defect.

The Public Trustee act arose out of the 1893 panic and was for the purpose of protecting people of small means in the following two particulars:

(a) It gave a period of redemption not allowed under foreclosures by private trustees;

(b) It kept down the costs of foreclosure so that same would not be prohibitive.

We are now in a period of depression comparable to that following 1893, when there are many foreclosures, and are therefore able to appreciate the wisdom of this legislation.

We all recognize the public duty which we owe, as members of the Bar; and it seems to me that this is a particular instance where a public duty rests upon us. The Public Trustee act has been in almost universal use for 37 years in this state—long enough to fully demonstrate that it does carry out the beneficent purposes for which it was enacted; and at the same time we have come to know that it affords creditors a simple procedure and one much more rapid than a court foreclosure.

The Secretary of the Denver Bar Association has asked me to refer to a contention which recently has been made that a judgment creditor still has three months after the first six months in which to redeem from a sale by the public trustee. This contention is based upon the fact that the 1929 act (with the 1931 amendment) refers only to "incumbrancers" and "lienors" and does not in its terms include judgment creditors. Of course a judgment creditor may make himself a lienor by filing a transcript of his judgment; but it has been suggested that he need not file such transcript and that, unless he files such transcript, he is not a lienor.

This argument would seem to overlook the fact that the filing of a transcript is not the only way in which a judgment creditor can obtain a lien. He likewise obtains a lien by making a levy; and causing a levy to be made was the first step the judgment creditor had to take under the 1894 Public Trustee act if he wished to make a redemption. Section 5055 C. L. 1921 provided that a judgment creditor wishing to redeem "shall sue out an execution upon his judgment, and place the same in the hands of the proper officer to execute, and thereupon such officer shall endorse upon the back of said execution a levy upon the lands or tenements which said judgment creditor may wish to redeem."

The act of 1919 (Section 5932 C. L. 1921) provides that when in any case a writ of execution is issued and a levy thereunder is made upon real estate "it shall be the duty of the sheriff * * * to file a certificate of such fact with the recorder" and Section 5934 expressly states that "the lien of an * * *

execution levied on real estate" shall continue for six years from the filing of the certificate by the sheriff. These various statutory provisions show that the first step which a judgment creditor had to take under the old Public Trustee act was to make his judgment a lien by having the sheriff make a levy, and that it was the duty of the sheriff to record a certificate of such levy. This clearly brings the judgment creditor, who is attempting to redeem, within the language of the second paragraph of Section 2 of the 1929 act on redemptions (no change in this language having been made by the 1931 act) as follows:

"No lienor or encumbrancer shall be entitled to redeem unless within the redemption period in the preceding section provided for, he files a notice of his intention to redeem with the public trustee, sheriff, or other official making the sale and unless his lien appears by instruments duly recorded or filed as permitted by law."

It is apparent from this section that no lienor may redeem unless two things concur:

(a) Within the first six months after the sale he must file a notice with the public trustee of his intention to redeem;

(b) His lien must be recorded. In regard to the time when the lien must be recorded the same Section 2 continues:

"No lienor shall be entitled to redeem under this section unless his lien appears by an instrument so recorded or filed prior to the expiration of the six month period of redemption in the preceding section provided for."

Construing all these statutes together, it seems clear that:

First, a judgment creditor seeking to redeem under the old statute had to make himself a lien creditor by the levy of his execution; and

Second, the acts of 1929 and 1931, which apply to all lien creditors, must govern redemption by a judgment creditor, because he must make himself a lien creditor by the levy of his execution.

If these conclusions are sound, it necessarily follows that redemption by a judgment creditor is governed by the acts of 1921 and 1931 and that the time of his redemption is limited to six months.