

# The Rights of Junior Lienholders in Wisconsin

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## THE RIGHTS OF JUNIOR LIENHOLDERS IN WISCONSIN

This article will attempt to consider the general and Wisconsin law on the rights of the holder of a subordinate lien. Generally we will concern ourselves with the problems facing second mortgagees. This paper does not cover the law of priorities; and, throughout the article, we will assume that that problem has been settled. Problems in this field arise only when a debtor has defaulted on an obligation secured by a senior lien and the holder thereof is taking action to enforce his claim. This does not mean that the junior lienholder has no special rights outside of foreclosure by the senior lienholder, but rather that he has no real problems until the senior lienholder takes some action which may cause the junior lienholder to lose his security.

To put this problem into proper perspective, it may be well to set up a hypothetical fact situation. Assume that M owns Blackacre which is worth \$15,000. To purchase it he gave a first mortgage for \$10,000 to A and a second mortgage for \$5,000 to B. Thereafter, C, a contractor, does certain work on the premises for a price of \$1,000 and properly files a contractor's lien,<sup>1</sup> assuming he was not paid for his work. Then D, to whom M owes a debt, sues and gets judgment, which judgment, upon proper docketing,<sup>2</sup> becomes a lien on Blackacre. Further assume that the liens have priority according to the time of creation. If N defaults in his payment on the mortgage to A, A will foreclose. Our problem in this article is to determine what are the rights of B, C, and D upon A's foreclosing.

In theory the value of the property should equal the total of the liens of A, B and C, since A and B loaned the money on the value of the property and C added value to the property equal to the lien. Since D's lien arose out of a transaction unrelated to the property, the property value may not cover his lien. While this is theoretically so, the property is not likely to sell for its full value, this being one of the defects of a forced sale. Blackacre, in the preceding illustration, should be worth \$16,000. If \$16,000 or more is realized on the sale, A, B and C will be whole and only D may stand to lose; but if the sale realizes less than \$16,000, we are faced with the problems which this article shall consider: the rights of the junior lienholders (B, C, and D).<sup>3</sup>

### MORTGAGE LAW GENERALLY

To begin with it may be well to set out a few basic, well-known principles of mortgage law. *The American Law of Property* indicates that there are three recognized theories on which the several

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<sup>1</sup> WIS. STAT. §289.06 (1957).

<sup>2</sup> WIS. STAT. §270.79 (1957).

<sup>3</sup> This article shall also consider the rights of B, C, and D, when the property brings full value, but the real problems arise when, as is usual, full value is not realized on the forced sale.

States base their mortgage law. These are the common law, or title, theory, the intermediate, or hybrid, theory and the lien theory.<sup>4</sup> Actually the first two theories may be lumped under the generic term of title theory. In title theory states the form of the mortgage, which purports to be a deed, governs; and title, plus the right to possession, passes to the mortgagee.<sup>5</sup> In states adopting the hybrid theory, title passes to the mortgagee but the mortgagor retains the right to possession at least until default.<sup>6</sup> This theory is also known as the equitable theory.<sup>7</sup> In lien theory states, the mortgage creates only a lien and title passes to the mortgagee or his successor only when a sheriff's deed is issued after a sale on foreclosure.<sup>8</sup> Wisconsin is a lien theory state.<sup>9</sup>

When, under the common law title theory, the rights of the mortgagee were considered by the courts as being too great, the courts devised the equity of redemption to enable the mortgagor to have some measure of protection. This gave the mortgagor or his successor a personal privilege which is transferable and exercisable by an assignee. The equity of redemption is "a right of the mortgagor of an estate to redeem the same after it has been forfeited at law by a breach of the condition of the mortgage, upon paying the amount of debt, interest and costs."<sup>10</sup> Generally any one who has an interest in the property which would be lost by foreclosure is entitled to redeem.<sup>11</sup> This right can be of great importance to a junior lienholder who may exercise it in certain circumstances which shall be set out later in this article.

While this equitable right was necessary to protect mortgagors, it was also necessary that this right be limited in duration so that the mortgagee could eventually make use of the security to pay off the debt. To effect this end the foreclosure action was devised. Originally a mortgagee went to a court of equity, and upon a showing of the mortgagor's default, equity ordered the mortgagor to pay the debt within a reasonable time or be forever barred from redeeming. At the end of the time, under the common-law theory, if the mortgagor had not paid, the property belonged to the mortgagee free and clear. This proceeding was known as strict foreclosure, a name it still bears. Strict

<sup>4</sup> 4 AMERICAN LAW OF PROPERTY §16.13 (1952).

<sup>5</sup> *Lloyd's of London v. Fidelity Securities Corp.*, \_\_\_ Ala. \_\_\_, 105 So. 2d 728 (1958), where the Alabama court said: Alabama nominally classifies itself as a title state, i.e., a mortgage passes title to the mortgagee.

<sup>6</sup> 4 AMERICAN LAW OF PROPERTY §16.14 (1952).

<sup>7</sup> 9 THOMPSON, REAL PROPERTY §4651 (1958 Replacement).

<sup>8</sup> *People v. Nogarn*, \_\_\_ Cal. \_\_\_, 330 P. 2d 858 (1958), where the court says: Under the law of this state a mortgage is but a hypothecation of the property mortgaged. It creates but a charge or lien upon the property hypothecated without the necessity of a change of possession and without any right of possession in the mortgagee and does not operate to pass the legal title to the mortgagee.

<sup>9</sup> *Zimmermann v. Walgreen Co.*, 215 Wis. 491, 255 N.W. 534 (1934); *Marshall & Ilsley Bank v. Greene*, 227 Wis. 155, 163, 278 N.W. 425, 428 (1938).

<sup>10</sup> BLACK, LAW DICTIONARY (4th ed. 1951).

<sup>11</sup> 9 THOMPSON, REAL PROPERTY §4826 (1958 Replacement).

foreclosure is still used in England and some American jurisdictions but it has been largely replaced by foreclosure by sale.<sup>12</sup>

Foreclosure by sale provides for a sale of the property which is the subject of the mortgage to pay the debt of the mortgage. It may come about by court action or under a power of sale granted in the mortgage itself. Fundamentally, in either case, the property is sold under certain statutory safeguards and the proceeds of the sale are used to pay the expenses of the proceeding and the claim of the mortgagee.<sup>13</sup> If there be any surplus thereafter, it goes to the mortgagor, or, as we shall hereafter see, to others who have a claim to it. Another procedure which may be followed for a foreclosure by sale is that of advertisement. For the problem at hand the important aspect of whatever method is used is that it cuts off the equity of redemption.

The effect of foreclosure is to end the right to redeem in all persons who have an interest in the property such as to give them such a right.<sup>14</sup> It is, of course, well recognized in this field, as in others, that a person to be affected by a court decree must be before the court.<sup>15</sup> This point is of importance to a junior lienholder. While the mortgagor's equity of redemption will always be cut off by the foreclosure (assuming that all the necessary statutory procedures are followed), a junior lienholder who is not joined loses no rights.

#### JUNIOR LIEN LAW GENERALLY

After the above rather cursory survey of mortgage law we shall now turn our attention to the specific subject of this article: junior liens. Two procedural situations will in great part determine the rights of the junior lienholder when a senior lienholder forecloses. The junior lienholder may, and generally will, be joined, or he may not be. If he is joined he loses his interest in the land which interest is transferred to any surplus upon the sale.<sup>16</sup> Unfortunately for the junior lienor, there seldom is much of a surplus to which this interest may transfer. To the extent of the surplus, subordinate security interests are accelerated; and a junior lienor's rights are discharged out of the surplus even though the debt, by its terms, has not yet matured.<sup>17</sup>

If a junior mortgagee is not joined his rights against the land remain unaffected.<sup>18</sup> He has no interest in the surplus<sup>19</sup> nor do his rights improve.<sup>20</sup> Quite clearly, here the question is a pleading one for the foreclosing mortgagee. As Thompson points out:

<sup>12</sup> Note, 25 VA. L. REV. 947 (1939); 4 AMERICAN LAW OF PROPERTY §16.10 (1952).

<sup>13</sup> 4 AMERICAN LAW OF PROPERTY §16.10 (1952).

<sup>14</sup> *Id.* §16.188.

<sup>15</sup> *Id.* §16.191; 3 POWELL, REAL PROPERTY §453 (1952).

<sup>16</sup> 3 POWELL, REAL PROPERTY §467 (1952).

<sup>17</sup> *Ibid.*

<sup>18</sup> 4 AMERICAN LAW OF PROPERTY §16.188 (1952); POWELL, REAL PROPERTY §467 (1952).

<sup>19</sup> 3 POWELL, REAL PROPERTY §457 (1952).

<sup>20</sup> See material on Wisconsin law below at note 48.

All parties in interest should be joined, inasmuch as it is true that the proper object of a bill in equity to foreclose a mortgage is to cut off all rights subsequent to the mortgage.<sup>21</sup>

The distinction between a necessary and a proper party is of little consequence in this area; for, although the foreclosure will effectively cut off the interests of all who are made a party to it, even though some lienors are not made parties, the object of the action is to pass to the purchaser on the sale a clear title. Unless all lienors are joined, such title cannot be passed and the sale will result in only a small recovery.

At this point we have seen that a junior lienholder may lose his rights if made a party to the foreclosure action; and, if not a party, retains his rights, although he does not better them. It is now necessary to determine what those rights are. A junior lienholder has, of course, the right to foreclosure under his mortgage and have the land sold subject to the prior mortgage.<sup>22</sup> If the prior mortgage is anywhere near the full forced-sale value of the land this will be a shallow right. In such a case the junior lienholder need not even join the holders of prior mortgages because the court cannot cut off their rights in any case. A junior mortgagee cannot foreclose a prior mortgage by merely making the prior mortgagee a party defendant in his foreclosure suit.<sup>23</sup>

As has been noted above, a junior lienholder may have a right of redemption. This right is often governed by statute, and later in this article we shall consider the Wisconsin statute governing this process. To be able to redeem, the person claiming the right must either be an owner of the mortgagor's original equity, or have an interest in it.<sup>24</sup> The junior lienholder, though his mortgage or other lien, has acquired such interest in the mortgagor's equity.<sup>25</sup> The junior mortgagee may redeem from a senior mortgagee seeking foreclosure, but may not redeem when the senior mortgagee is not seeking to foreclose.<sup>26</sup> A junior mortgagee cannot force a senior mortgagee to foreclose.<sup>27</sup>

Various jurisdictions recognize one of three possible positions of a junior mortgagee after he redeems. Generally he gets the rights of a purchaser on foreclosure sale. These rights, assuming no one else redeems, ripen into title.<sup>28</sup> The second possibility is that the redemption will only avoid the foreclosure judgment, just as in the case of a redeeming mortgagor.<sup>29</sup> Illinois follows this theory.<sup>30</sup> When a junior mortgagee finds himself in this position he adds to his debt the amount

<sup>21</sup> 10 THOMPSON, REAL PROPERTY §5143 (1957 Replacement).

<sup>22</sup> 4 AMERICAN LAW OF PROPERTY, §16.191 (1952).

<sup>23</sup> 10 THOMPSON, REAL PROPERTY §5126 (1957 Replacement).

<sup>24</sup> 9 THOMPSON, REAL PROPERTY, §4826 (1958 Replacement).

<sup>25</sup> 3 POWELL, REAL PROPERTY §453 n. 41 (1952).

<sup>26</sup> 9 THOMPSON, REAL PROPERTY §4826 (1958 Replacement).

<sup>27</sup> THOMPSON, REAL PROPERTY §5126 (1957 Replacement).

<sup>28</sup> 4 AMERICAN LAW OF PROPERTY §16.177 (1952).

<sup>29</sup> *Ibid.*

paid to redeem and then is compelled to bring an action to foreclose his mortgage with said addition. The third position is the one adopted by Wisconsin. The redeeming junior lienor becomes subrogated to all the rights of the foreclosing prior mortgagee in the foreclosure judgment.<sup>31</sup> It may be further noted, as Thompson pointed out, that a junior mortgagee upon "paying off the lien of the senior mortgagee becomes subrogated to the lien thereof and may foreclose."<sup>32</sup>

This suggests a very important right of a junior mortgagee: subrogation. Subrogation is defined as:

. . . the substitution of one person to the position of an obligee whose claim he has satisfied. The result of subrogation is that the person subrogated stands in the shoes of the one whose claim has been discharged by his performance. He succeeds to all of the rights, priorities, liens and securities of the former obligee.<sup>33</sup>

In the real property field, subrogation will generally be recognized when a person not legally bound to pay does so to protect some interest of his own.<sup>34</sup> *The American Law of Property* indicates that anyone adversely affected by enforcement of a mortgage may pay it off and be subrogated to the position of the mortgagee. "Thus a junior mortgagee may pay off a prior mortgage and be subrogated to all rights under it against the mortgagor."<sup>35</sup>

The junior mortgagee has several other rights which are worthy of consideration. Through the principle of marshalling, he can prohibit the senior mortgagee from capriciously wiping out his security in a part of a large tract of land. Assume that the mortgagor owns a new subdivision which he divides into three lots. The first mortgagee takes a mortgage on the entire subdivision. Then a second mortgagee takes a mortgage on one of the lots. The mortgagor defaults on the first mortgage and the mortgagee forecloses. The first mortgage, under the marshalling doctrine, assuming that all the land need not be sold to pay

<sup>30</sup> ILL. ANN. STAT. c. 95, §22a (1950).

"Rights of Junior Mortgagee. Any person who has a mortgage lien upon any land against which there exists a prior mortgage may pay any interest or any installment of the principal or interest which may be in default upon any such prior mortgage and all such sums so paid shall become a part of the debt secured by such junior mortgage shall bear interest from the date of payment at the same rate as the indebtedness secured by such prior mortgage and shall be collectible with, as a part of and in the same manner, as the amount secured by such junior mortgage."

<sup>31</sup> WIS. STAT. §278.15 (1957).

<sup>32</sup> THOMPSON, REAL PROPERTY §5125 (1957 Replacement).

<sup>33</sup> 4 AMERICAN LAW OF PROPERTY §16.145 (1952). BLACK, LAW DICTIONARY (4th ed. 1951) defines it as:

The substitution of one person in the place of another with reference to a lawful claim, demand or right; so that he who is substituted succeeds to the rights of the other in relation to the debt or claim, and its rights, remedies, or securities.

<sup>34</sup> 4 AMERICAN LAW OF PROPERTY §16.147 (1952).

<sup>35</sup> *Id.*

off his mortgage, cannot have only the lot in which the second mortgagee has his security sold on the foreclosure. A junior mortgagee who seeks to exercise the right of marshalling must properly assert it before sale or other foreclosure takes place.<sup>36</sup>

There are two principles involved in marshalling. The first is known as the "inverse order of alienation." Under this principle, a first mortgagee, when the land is aliened in separate parcels, must satisfy his lien out of land remaining in the mortgagor, if possible, and if such land be insufficient, then he must resort to the parcels aliened in the inverse order of alienation. The other principle is the doctrine of "two funds," which is applied when the senior mortgagee has two funds out of which to satisfy his debt while the junior mortgagee has only one. For example, M has a mortgage on lots X and Y owned by A. T has a second mortgage on lot Y. Therefore, if M forecloses first on lot Y, T loses all his security, whereas if M forecloses first on X, T still retains his security. Therefore under the "two funds" doctrine, M will have to foreclose first on X. No matter which principle is used, it may not be used to prejudice the senior mortgagee's rights.<sup>37</sup>

One method by which a mortgagee may procure the property is through the doctrine of merger. If the mortgagor conveys the equity of redemption to the mortgagee, a merger is effected and complete title is in the mortgagee. The conveyance itself does not cut off the junior liens and their existence precludes a merger.<sup>38</sup> The senior lien is kept alive to protect the mortgagee acquiring title as against junior encumbrances, so as to permit the senior mortgagee to bring foreclosure against the junior mortgagees.<sup>39</sup>

A further problem, having two phases, remains to be considered before we specially consider Wisconsin law on this subject. The problem, in essence, is what rights the junior mortgagee has if the mortgagor reacquires the mortgaged property after the foreclosure of the prior mortgage. The first example of this problem occurs when the mortgagor exercises his right of redemption. Junior liens are revived if he does so.<sup>40</sup> The other phase occurs when the mortgagor reacquires the property after it has been sold on foreclosure. Generally the cases have held that this is an exception to the general rule that the foreclosure of the first mortgage extinguishes the lien of the junior encumbrances.<sup>41</sup> The cases which have so held, in the absence of statute, do so principally on the theory of estoppel by deed.<sup>42</sup>

<sup>36</sup> *Id.* §16.154.

<sup>37</sup> *Id.*

<sup>38</sup> 3 POWELL, REAL PROPERTY §459 (1952).

<sup>39</sup> 9 THOMPSON, REAL PROPERTY §4798 (1957 Replacement).

<sup>40</sup> POWELL, REAL PROPERTY §470 (1952).

<sup>41</sup> Comment, 10 WIS. L. REV. 520 (1935).

<sup>42</sup> The case of *Ayer v. Philadelphia & Boston Face Brick Co.*, 157 Mass. 57, 31 N.E. 717 (1892) illustrates this phase of the problem. One Waterman executed

## WISCONSIN LAW ON JUNIOR LIENHOLDERS

We shall now consider the special provisions of Wisconsin law on this subject. The rights of junior lienholders are governed by certain sections of Chapter 278, entitled Foreclosure. The section of Chapter 278 which is of primary importance to a junior lienholder is section 278.15:

Any person having a junior lien upon the mortgaged premises or any part thereof or interest therein, may at any time before such sale, pay to the clerk of court, or the plaintiff or his assignee the amount of such judgment, taxes, interest and costs, and costs subsequent to judgment, and shall thereupon be subrogated to all the rights of the plaintiff as to such judgment.

The principal requirement of this section is that the amount of the judgment, taxes, interest, and costs be paid before the foreclosure sale. If this is done the junior mortgagee becomes subrogated to the plaintiff's rights in the sale.

Section 278.102, Wis. Stat., is as follows:

If there shall be any surplus paid into court by the sheriff or referee, any party to the action or any person not a party who had a lien on the mortgaged premises at the time of sale, may file with the clerk of court into which the surplus was paid, a notice stating that he is entitled to such surplus money or some part thereof, together with the nature and extent of his claim.

Our Court has held that a junior lienholder seeking to share in the surplus under 278.102 need not make his claim for a share therein until it has been determined that there will be a surplus.<sup>43</sup> By so construing the statute, the Court allows a junior lienholder to do nothing in the foreclosure suit until he is assured of a return for his efforts. This is an advantage only when the property will bring more on the forced sale than the amount of the first mortgage.

To briefly summarize, the junior lienholder, when made a party to the foreclosure action, has the right to redeem under section 278.15, to share in the surplus under 278.102, and to defend the suit, since he is a party defendant. He has the further incidental right of being

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first and second mortgages upon a certain parcel of property. The first mortgage was foreclosed. The purchaser on the foreclosure sale reconveyed the land to Waterman, under whom the defendant Brick Co. held. Plaintiff was the holder of the second mortgage and sought to foreclose on the theory that, when the premises came back to Waterman, his title inured to the benefit of the holders of the second mortgage by force of his covenants of warranty therein. Waterman had warranted against the first mortgage even though, in the granting clause of the second mortgage, he granted subject to the first mortgage. The court adopted the plaintiff's theory. In a later hearing of the same matter (155 Mass. 84, 34 N.E. 177 (1893)), Justice Holmes indicated that, if the second mortgage was construed as warranting against the first, "the title afterwards acquired by the mortgagor would inure to the benefit of the second mortgagee under the established American doctrine."

<sup>43</sup> Kienbaum v. Haberny, 273 Wis. 413, 78 N.W. 2d 888 (1956).

a necessary party<sup>44</sup> to any stipulation shortening the redemption period.<sup>45</sup> Furthermore, Wisconsin holds that the redemption statute is in the nature of an exemption statute and its benefits may not be waived.<sup>46</sup> While this does not mean that the mortgagor cannot convey his equity of redemption to the first mortgagee, he cannot thereby either defeat or promote the second mortgage.

As was pointed out in the initial paragraphs of this article, property seldom brings its true value on forced sale. For that reason, a junior lienholder may wish to exercise his right of redemption under Section 278.15 so as to purchase time to negotiate a sale of the property which will bring true value. This is perhaps the greatest single advantage to the junior lienholder's redemptive right.

The above discussion has principally concerned itself with the rights of junior lienholders who have been joined in an action to foreclose the first mortgage. Wisconsin has long recognized that a junior lienholder who is not a party to the action cannot have his rights affected therein.<sup>47</sup> But our Court has also stated that:

Where a senior mortgage has been foreclosed without making the claimant of a subordinate lien a party, the proceedings are not null and void but leave the holder of the subordinate lien with the same rights that he would have had had he been made a party to the foreclosure proceedings. This implies that his rights are not improved, or the rank of his junior lien advanced.<sup>48</sup>

This indicates that the junior lienholder who has not been joined retains all of the rights spoken of above.

A discussion of several of the leading Wisconsin cases on this problem should be of value. One of the earliest of these cases, *Murphy v. Farwell*,<sup>49</sup> arose out of a unique fact situation. Murphy was the holder of a second mortgage. He was not made a party to the foreclosure action under the first mortgage. While this action was pending, Murphy started foreclosure on his mortgage. Farwell bought at the first mortgage foreclosure sale. Thereafter there was a sale under the second mortgage and Murphy bought at that sale. Murphy, after tender to Farwell, brought an action to enforce his claimed right to

<sup>44</sup> *Hiles v. The Milwaukee Power and Lighting Co.*, 85 Wis. 90, 55 N.W. 175 (1893).

<sup>45</sup> WIS. STAT. §278.10(2) (1957):

"But no such sale shall be made or advertised until the expiration of one year from the date when such [foreclosure] judgment is entered; . . . but in all cases the parties may, by stipulation, filed with the clerk, consent to an earlier sale."

<sup>46</sup> *Hiles v. The Milwaukee Power and Lighting Co.*, 85 Wis. 90, 55 N.W. 175 (1893).

<sup>47</sup> *Murphy v. Farwell*, 9 Wis. \*102 (1859); *Buchner v. Gether Trust*, 241 Wis. 148, 5 N.W. 2d 806 (1942).

<sup>48</sup> *Buchner v. Gether Trust*, *supra* note 47.

<sup>49</sup> *Murphy v. Farwell*, 9 Wis. \*102 (1859).

redeem from the first sale. Farwell resisted this. Murphy argued that, since neither party was bound by the other's sale, the result of the two sales was to give each a perfect title against all save the other. Therefore, all that was necessary to perfect title was to pay off the amount paid by the other party at the sale. Since both had the right, Murphy argued first come, first served.

The Court professed an inability to understand Murphy's argument, and affirmed the trial court's determination that Farwell was the owner of the fee and had a right to pay off Murphy's lien. The Court pointed out that Murphy's rights could not be affected in the action to which he was not a party but that the first sale transferred the entire interest of the mortgagor to Farwell. The Court says:

It seems very clear, therefore, that the fact that Murphy was not a party to the first suit, did not prevent the entire interest of (the mortgagor) from being transferred to Farwell by the sale, as well against Murphy as everybody else.<sup>50</sup>

The Court further decided that the doctrine of *lis pendens* is not applicable to the sale under the first mortgage because such an application is not within the intention of the rule.<sup>51</sup> The Court concludes by indicating that Farwell "acquired the interests of all the parties to the first foreclosure suit, including the interest represented by the first mortgage, and the equity of redemption subject only to the second mortgage." Murphy had only the interest represented by the second mortgage. Farwell then had an absolute right to pay off Murphy's mortgage.<sup>52</sup>

Two years later, in *Allen v. Case*,<sup>53</sup> the Court held that the *Murphy* case was not decided upon the fact "that the sale to Farwell was under a prior and paramount mortgage," but rather "upon the fact that the sale took place in pursuance of an interest in the property, acquired before suit brought."<sup>54</sup> The Court indicates that this may apply as well to a junior mortgage as to a first mortgage. The point of importance to this consideration was then stated as follows:

And we think the owner of either (first or junior mortgage), acquired before suit commenced, may, if not made a party, proceed to enforce his rights under his lien, without subjecting

<sup>50</sup> 9 Wis. at \*105-06.

<sup>51</sup> 9 Wis. at \*106-07. The rule was intended "to prevent parties, by voluntary conveyance after litigation is commenced, from eluding the grasp of the law, and baffling justice, to prevent mere intruders from acquiring rights in property after suits are begun in regard to it, and then claiming the right to litigate over again, the questions which those suits settled as against their vendors, or those whose interests they may have attached." The first mortgagee is no intruder since he is enforcing a prior and paramount right. The purchaser on such a sale is in the shoes of the mortgagee, having acquired his rights.

<sup>52</sup> 9 Wis. at \*104.

<sup>53</sup> *Allen v. Case*, 13 Wis. \*621 (1861).

<sup>54</sup> *Id.* at \*625.

the purchaser at his sale to the rule of *lis pendens*, because some other person interested in the property may at that time have a suit pending in regard to it.<sup>55</sup>

For the space of a year there was a dicta in Wisconsin to the effect that "this affected rights of others . . . because of the satisfaction of the mortgage debt (by a proper foreclosure proceeding), come to a position of advantage and one of more value."<sup>56</sup> The Court pointed out in two cases that this statement was dicta and that failure to make a junior mortgagee a party to the foreclosure suit does not give him any greater rights than he would have had had he been joined.<sup>57</sup>

In the *Buchner* case<sup>58</sup> the Court points out that equity protects the rights of the unjoined junior lienholder but does not improve them. Such a lienholder has a right to redeem from the sale but the purchaser on the sale may bring an action to compel the omitted party to exercise the right or have it barred. Upon such suit the Court will set a reasonable period during which the right must be exercised. The reader must perceive the similarity between this action and that of strict foreclosure.<sup>59</sup>

This case further points out that when a party fails to make use of Section 278.09, which allows the addition of parties after the judgment but before the sale,<sup>60</sup> and a defective judgment has been entered, the statutory scheme of foreclosure has been exhausted and any rights of the parties must be grounded in equity based "in part at least, upon the inadequacy of any legal or statutory forms of relief."<sup>61</sup> While the junior lienholder has a right of redemption, he may be barred by laches; but laches would be difficult to prove since both parties have an equitable right of action: the junior lienholder to redeem, and the purchaser at the sale an action to compel him to redeem. The purchaser, who himself could have brought an action, will be hard put to charge the lienholder with laches.<sup>62</sup>

<sup>55</sup> *Id.*

<sup>56</sup> *Winter v. Knaak*, 236 Wis. 367, 370, 294 N.W. 488, 489 (1941). Overruled on this point by cases cited in note 57 below.

<sup>57</sup> *Winter v. O'Neil*, 241 Wis. 280, 5 N.W. 2d 809 (1942). *Buchner v. Gether Trust*, 241 Wis. 148, 5 N.W. 2d 806 (1942).

<sup>58</sup> *Buchner v. Gether Trust*, *supra* note 57.

<sup>59</sup> See *supra* note 12.

<sup>60</sup> WIS. STAT. §278.09 (1957):

"In any action for the foreclosure of a mortgage, at any time after judgment and before a sale pursuant thereto, the plaintiff may be granted leave to amend the summons, complaint and all the proceedings in the action by making as defendant any person who is a proper or necessary party thereto. . . . After such person has been thus made a party and served, and his rights adjudicated upon, the original judgment may be so amended as to bar and foreclose him thereby, or to make any provisions in regard to his rights and interests in like manner as it could have done had he been made originally a party."

<sup>61</sup> 241 Wis. at 154, 5 N.W. 2d at 809.

<sup>62</sup> *Id.*

The junior lienholder, as was pointed out above,<sup>63</sup> who is joined as defendant in the foreclosure action, has to pay off the judgment and costs in order to become subrogated to the plaintiff's rights therein. Since a junior lienholder's rights remain the same when he is not joined, he also must pay the amount of the judgment (which is the amount due on the first mortgage) etc., if he wishes to exercise his right to redeem after sale. After the sale, this amount is paid to the purchaser on the sale, the first mortgage lien is revived, and the junior lienholder becomes subrogated thereto. The purchaser whose ownership of the ultimate equity of redemption is unaffected by the omission of the junior lienor from the foreclosure proceedings, still retains that right; and may exercise it by redeeming from both liens held by the junior lienor (i.e., the first mortgage lien and the junior lien). While situations may arise where this will work an injury to the purchaser, the reader should remember that "caveat emptor" applies at foreclosure sales. The buyer took the chance that there would be an unjoined mortgagee who would step in and exercise his rights.

Up to this point we have not considered the question of subrogation in this area in Wisconsin, except to set out above Section 278.15.<sup>64</sup> A junior lienholder may not only have subrogation as to the judgment, but, proceeding under Section 278.02, he may cause the plaintiff in the foreclosure action to assign the first mortgage to him.<sup>65</sup> It should be kept in mind that all a junior lienholder has to do to comply with 278.15 is to pay the amount of the judgment, taxes, interest, and costs before the sale so as to become subrogated to the rights of the plaintiff at the sale.<sup>66</sup> Under Section 278.02 a junior lienholder can demand an assignment either before or after the judgment in the foreclosure action.<sup>67</sup>

If a junior mortgagee advances payments of principal or interest due on a first mortgage so as to protect his own interest he becomes subrogated, to the extent of the advances, to the lien of the first mortgage, with the same right to enforce it as the first mortgagee possessed. The rule is meant to insure that the junior mortgagee suffers no loss, and that the defaulter enjoys no gain thereby.<sup>68</sup>

<sup>63</sup> See WIS. STAT. §278.15, set out above.

<sup>64</sup> *Id.*

<sup>65</sup> WIS. STAT. §278.02 (1957) :

"(1) In a mortgage foreclosure action, any defendant may upon payment to the plaintiff or his attorney, of the amount then owing thereon for principal, together with interest and all costs up to such time, demand the assignment of such mortgage to him. The plaintiff shall upon demand and a tender of the amount owing . . . assign the mortgage to such defendant and he shall be barred from further prosecuting such action. . . ."

<sup>66</sup> *Syver v. Hahn*, 272 Wis. 165, 74 N.W. 2d 888 (1956).

<sup>67</sup> WIS. STAT. §278.02(2), in conjunction with §278.02(1).

<sup>68</sup> *Vogt v. Calvary Lutheran University Missionary Society*, 213 Wis. 380, 251 N.W. 239 (1933).

A junior lienholder may also gain certain rights under the tax laws of Wisconsin. Section 74.67 indicates:

Whenever any person having any lien upon any real estate, obtained pursuant to law, shall have paid any taxes on such real estate, or shall have redeemed such real estate, when the same shall have been sold for taxes, he shall have a further lien upon such real estate as against the person under whose title he claims such first lien and all other persons then claiming under him for the amount of money so paid, with interest . . . , and against all other persons claiming title to such real estate under such persons accruing subsequently to the time of recording the notice hereinafter specified.

The notice mentioned is provided for in Section 74.68.<sup>69</sup> This section gives the junior mortgagee the right to add the amount paid to his mortgage lien.<sup>70</sup> It does not give him a lien prior to a first mortgage.<sup>71</sup> This seems logical since what the junior lienholder is doing is protecting his lien. He should not thereby be able to advance said liens.

The author perceives little value in discussing specific types of liens at this point. As was pointed out initially, this paper is not intended to consider the matter of priorities; and, once the priority question has been settled, the law as set out above is applicable to any junior lien.<sup>72</sup>

#### CONCLUSION

This article has attempted to consider the law as it applies to a junior lienholder when a senior lien is being foreclosed. The author feels that Wisconsin basically is in tune with the general law on this subject as set out by the commentators. While Wisconsin recognizes that a junior lienholder who is not joined cannot lose his rights, it recognizes as well that non-joinder does not advance his rights. A junior lienholder who is not joined has only such rights as he would have had, had he been joined.

A junior lienholder has certain specific statutory rights to the surplus on the sale under a first mortgage, rights which need not be claimed until the fact of a surplus is ascertained. He is further entitled to subrogation to the judgment of a senior mortgagee when he pays off that judgment.

<sup>69</sup> WIS. STAT. §74.68 (1957):

"Any person paying money as aforesaid may cause to be recorded in the office of the register of deeds of the county where the real estate is situated a notice, signed and acknowledged by him, stating the land upon which the tax or redemption money was paid and the amount of the moneys thus paid."

<sup>70</sup> 23 OP. ATTY. GEN. 763 (Nov. 21, 1934).

<sup>71</sup> Johnson v. Bank of New Richmond, 188 Wis. 620, 206 N.W. 871 (1926).

<sup>72</sup> For example, WIS. STAT. §289.09 (1957), dealing with the foreclosure of a contractor's lien, says that the provisions of chapter 278 control as far as applicable except as modified by chapter 289. This author is unaware of anything in said chapter which would change the law relating to junior lienholders as set out in this article.

It is the author's opinion that a junior lienholder is well protected under Wisconsin law when the property is of sufficient value to cover both the first lien and the subsequent one. If the property is not of such value, a junior lienholder stands to lose his security; but taking such security in such a case was a gamble, and all gamblers face the prospect of losing at one time or another.

So that, in the hypothetical illustration appearing early in this paper, junior lienors B, C, and D each have a somewhat difficult matter to forecast: on forced sale, will the premises bring enough to satisfy their respective liens? In determining whether or not to exercise their right of redemption, they must 1) minimize the possibility that ultimate resale will fail to return their respective redemption costs, and 2) see a fair likelihood that a negotiated resale (perhaps after some decrease of the indebtedness by periodic application of rents and profits) will yield sufficient to retire at least a fair portion of their respective junior claims.

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