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# Redemptions from Judicial Sales under the Laws of Illinois.

By Herbert Becker\*

and

George E. Harbert†

Nothing is more perplexing than the state of our laws of redemption from judicial sales. The subject is very large and the problems very numerous. It was our thought that in view of the fact that scarcely anything exists in published form on the subject, a comprehensive analysis of our laws would be helpful to the bar.

## General Observations

Redemption, in its broadest sense, means the repayment of any loan or the payment of any debt, but in the commonly accepted meaning to which we have occasion to refer, redemption means the statutory right given to various parties to redeem from a judicial sale. This right being purely statutory, cannot be exercised except within the period of time and in the manner substantially as pointed out in the statute. (*Chicago Savings Bank and Trust Co. v. Coleman*, 283 Ill. 611).

The purpose of redemption is to subject the property of the debtor to the payment of as many debts as possible and to accomplish this end the Statutes are liberally construed. (*Level v. Goosman*, 285 Ill. 347. *Garden City Sand Co. v. Christley*, 289 Ill. 617).

The right of redemption arises by virtue of two sections of the Statute. The first is Section 16, Chapter 77, Cahill's 1927 Statutes, which was construed in *Locey Coal Mines v. C. W. & B. Coal*

Company, 131 Ill. 9, as being an absolute grant of redemption from all judicial sales, the Court saying: "The language of the Statute is imperative and seems to contemplate no exceptions." The other is Section 24, Chapter 95, Cahill's 1927 Statutes, which was passed in 1879 abrogating the power of sale in any mortgage, trust deed or other conveyance in the nature of a mortgage, and which provided that no real estate should be sold to satisfy any such mortgage or other debt, except in pursuance of a judgment or decree of a court of competent jurisdiction. The statutory right to redeem is absolute and the parties cannot by contract destroy it. (*Bearss v. Ford*, 108 Ill. 16 and *Tennery v. Nicholson*, 87 Ill. 464). Regardless of the form which the conveyance may take, if it is in fact a mortgage, it must be foreclosed with the consequent attendant right of redemption. (*Devoigne v. Chicago Title and Trust Company*, 304 Ill. 177). So even though a deed is a warranty deed absolute on its face, if it is in fact a mortgage, that is, if in fact the deed was given as security for a debt, it must be foreclosed. In such case, the grantor in the deed may file a bill asking for the right to redeem, or if he fails or refuses to do so, a judgment creditor may file such a bill. (*Morgan v. Carson*, 214 Ill. App. 569).

Before proceeding, it might be well to

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define some of the terms which we shall use hereafter in order to avoid confusion or the necessity of repetition. The owner of the equity of redemption, commonly known as the owner of the fee, becomes, upon the entry of a decree of sale, the owner of the right to redeem. The holder of this right to redeem is under no legal obligation to redeem and there is no action which can be brought to compel him to exercise his right. (*Morgan v. Clayton*, 61 Ill. 35). This right is probably not real estate nor is it an interest in real estate legal or equitable upon which a judgment can become a lien. It is entirely distinct from what is known as the equity of redemption which was incident to the mortgage and which was cut off by foreclosure sale. The right of redemption is not an estate but a mere privilege granted to the mortgagor whose equity of redemption has been foreclosed. The statutory right of redemption cannot be sold on execution. (*People for the use of Fortune Brothers Brewing Company v. Barrett*, 165 Ill. App. 94 and *Hill v. Blackwelder*, 113 Ill. 283). However, there are cases which hold that since the certificate of sale is nothing more than a right either to the redemption money or to a deed, in case no redemption is made, the title of the holder of the right to redeem is, in fact, a fee title, and that if the master's deed is never issued to the purchaser at the foreclosure sale, the title *remains* in the holder of the right to redeem and does not *revest* in him. In other words, he never loses his title until a master's deed actually issues. (*Schroeder v. Bozarth*, 224 Ill. 310 and *Sutherland v. Long*, 273 Ill. 309). In this discussion, however, we shall call the owner of this right to redeem, the owner of the fee title.

It is also necessary to point out the distinguishing features between a decree of foreclosure and a judgment. A decree is entered by a court of equity and except where expressly made so by statute is not a lien. A decree of foreclosure is in the nature of a decree in rem and is not a decree for the payment of money,

but is an alternative one ordering in default of the payment of money, the sale of certain specific property. Such a decree does not in itself create a lien. It is not such a judicial order upon which an execution may be sued out or which may be made the basis of a levy. (*Illinois National Bank v. School Trustees*, 211 Ill. 500). The decree is the basis for the sale only of a certain specific piece of property therein described and must contain clear and explicit directions as to how and when it shall be sold. Thus a decree of foreclosure ordering the sale of the property of the debtor "in accordance with the Statutes" is invalid. (*Crosby v. Kiest*, 135 Ill. 458). Under a decree of foreclosure only the property described in the decree may be sold. Other property not described in the decree belonging to the debtor cannot be sold to satisfy the decree. A decree of foreclosure never outlaws, the seven year limitation upon judgments having no effect upon decrees of foreclosure. (*Kirby v. Runols*, 140 Ill. 289).

It is not until a sale of the specific property in question has been had and the sale was for an amount insufficient to satisfy the decree that a so-called deficiency decree may be entered, which decree is a money decree pure and simple and then for the first time assumes the nature of a judgment.

A decree of foreclosure moreover can be entered upon service by publication but in such case, no deficiency decree may be entered against the parties served by publication. This rule was first laid down in the old and celebrated case of *Pennoyer v. Neff*, 95 U. S. 714 and has never been questioned. The difference, of course, is that the decree of foreclosure is a decree in rem, while the deficiency decree is one in personam. (*Northern Trust Company v. Sanford*, 308 Ill. 381).

These are the important features of a decree of foreclosure which have a bearing on our discussion. It is, of course, well understood that a judgment is also the basis of a sale from which redemption may be made. A judgment is a

purely statutory creature. It differs from a decree of foreclosure in this important respect—it is, by statute, a lien on all of the real property of the debtor, whether owned at the time the judgment was rendered or acquired subsequent thereto. A sale under a judgment is governed by the terms of the statute which must be followed, whereas a sale under a foreclosure decree is governed by the terms of the decree as we have pointed out.

Another important point which must be remembered is the difference in the mechanics of redemption existing by virtue of the Statute of 1917 dealing with judgments and decrees. This statute was repealed in 1921 restoring the law to the condition existing prior to 1917. The repealing statute of 1921, however, contained a savings clause by which the machinery of the 1917 Statute was saved for mortgages made between July 1, 1917, and June 30, 1921, or judgments rendered during that period. The limitations of space will not permit us to go into a discussion of redemptions under the 1917 Act and it is therefore to be understood that we are dealing with redemptions under the present statutes and those which existed prior to 1917.

One more point must be borne in mind. That is, a decree and sale thereunder supersedes the mortgage upon which it is based and the identity of such mortgage is completely lost. The mortgage and the liability thereunder is merged in the decree. Thus, a sale under such a decree exonerates the property from the lien of the indebtedness and the subsequent rights of the creditors are determined solely by the decree and not by the terms of the original mortgage. (*Lightcap v. Bradley*, 186 Ill. 510). But until the sale of the property is completed, the entry of a decree does not extinguish the lien and the creditor may abandon his proceedings and sue upon his note at law. (*Morgan v. Sherwood*, 53 Ill. 171). Nor does the fact that a judgment has been obtained upon the note sought to be foreclosed bar a foreclosure decree. (*Van Sant v. Allmon*,

23 Ill. 30. *Banchard v. Kohn*, 157 Ill. 579). Thereafter, the trust deed or mortgage remains as security for the judgment and may be foreclosed to satisfy the judgment. But a sale of real estate either under a judgment or a decree satisfies such judgment or decree as to the property described in the decree or which the judgment creditor selected for sale and forever frees such property from the mortgage foreclosed or the judgment. In other words, even though the sale did not produce enough to pay the decree or judgment in full, the mortgagee or judgment creditor cannot resort a second time to the property thus sold for the payment of his deficiency. His remedies are exhausted as to that property. This rule is subject to one exception only, and that is, if the debtor who is primarily liable for the debt which was the basis of the sale, acquires the title subsequent to the sale by redemption or otherwise, the property in his hands is liable for the unpaid balance of the debt, that is, for the deficiency, and may again be subjected to sale for the payment thereof. (*Ogle v. Koerner*, 140 Ill. 170, *Strause v. Dutch* 250 Ill. 326).

#### Redemptions Within Twelve Months

Redemptions fall in two great classes:

- (1) Redemptions within twelve months after sale, and
- (2) Redemptions after twelve months after the sale and within fifteen months.

The effect upon the title to real estate of these two classes of redemptions is entirely different. The difference may be tersely stated to be that by redemption within the twelve months period no matter by whom made, no title is acquired by the redemptioner, whereas by virtue of a redemption properly made and completed after the twelve months period, the redemptioner acquires the title to the property. With this important distinction constantly in mind, we now proceed to discuss first the redemptions which may be made within the twelve months period.

The statute gives the right to redeem to "any defendant, his heirs, administrators, assigns or any person interested in the premises through or under the defendant."

Perhaps the simplest form of redemption which is encountered is a redemption made by the owner of the title to the property within twelve months after the judicial sale has been made under a decree of foreclosure or under a judgment. For the purposes of redemption twelve months begins and ends upon the same date. Thus, if a sale of the premises be made on February 1st of one year, a redemption by the owner of the equity may be made on February 1st of the succeeding year, this being the last day considered to be within the twelve months period. (*Roan v. Rohrer*, 72 Ill. 582).

In order to make a redemption under the statute, it is only necessary for the redemptioner to pay the amount for which the property was sold without regard to the amount of the decree. (*Ogle v. Koerner*, 140 Ill. 170).

The redemption wipes out the sale and if the sale was sufficient to pay the judgment or decree in full, no question arises. The title is in the same position as if the judgment or decree had been paid before the sale and since the debt upon which the decree is rendered has become merged into the decree, this obligation disappears. (*Butler v. Brown*, 205 Ill. 606). In case of a foreclosure of a first mortgage on property upon which there is also a second mortgage, the effect of a redemption by the owner of the fee title may vary according to different circumstances. If the second mortgagee did not file a cross-bill to foreclose his mortgage and the decree is confined to the foreclosure of the first mortgage, then the redemption by the owner of the title has this effect:—If the sale is for the full amount of the first mortgage, his redemption re-instates the second mortgage. If the sale is insufficient to pay the first mortgage and he is not per-

sonally liable on the first mortgage, his redemption re-instates the second mortgage and he takes free from the deficiency on the first mortgage. If he is personally liable on the first mortgage, his redemption from a sale for less than the amount due on the first mortgage re-instates the second mortgage and the deficiency on the first becomes a lien on his title. But the results are different in case the second mortgagee files a cross-bill and the decree provides for the sale of the property to satisfy both the first and second mortgages. If, under such circumstances, the sale is for the full amount due on the first and second mortgages, the redemption by the owner of the fee simple wipes out the foreclosure. If the sale is for less than the amount due the first and second mortgages and if the owner of the fee is not personally liable for the debts, his redemption frees the property from the lien of the mortgages and the deficiency on the sale. If, however, the owner of the fee is personally liable for the debts and redeems from a sale for less than the amount due under the decree foreclosing the first and second mortgages, he takes the title subject to a charge for the unpaid balance. (*Ogle v. Koerner*, *Supra*. *Easter v. Holcomb*, 221 Ill. App. 485).

In other words, in case of a redemption by the owner of the fee, the title remains in him freed from those debts upon which the sale was based and for which he was not personally liable, but subject, of course, to all junior encumbrances and liens which, though they might have been cut off by the issuance of a master's deed, were not cut off because of the redemption by the owner.

If, however, he is liable personally to pay the debt which was the basis of such judgment or decree, as for example, if he is the mortgagor or has purchased the property and has assumed and agreed to pay the encumbrance, (*Miller v. Thompson*, 34 Mich. 10, *Albany City Savings Institute v. Burdick*, 87 N. Y. 40) the sale for less than the amount of

the decree or judgment does not extinguish the debt. In *Strause v. Dutch*, 250 Ill. 326 at page 330, the Court speaking of this situation says: "Upon the sale of the premises under the foreclosure decree, the liens of the two trust deeds upon which the foreclosure suit was predicated were extinguished. Those liens no longer existed and the complainant in the foreclosure suit had secured every benefit possible to be secured under such liens. The debt itself, however, was not extinguished. A portion of it remained unsatisfied by reason of the failure of the property to sell for the full amount of the indebtedness. Under such circumstances, the creditor if personal service has been had upon the debtor, may have a deficiency decree for the balance due upon which execution may issue as on a money decree, (Hurd's Statute 1909, Chapter 95, Section 16), or he may bring his action at law and secure judgment for the balance due. Such deficiency decree or judgment is secured by no lien whatever. It is not based upon the lien of the mortgage but upon the personal liability of the mortgagor to pay the full amount of the indebtedness secured by the mortgage. A creditor with such a decree or judgment is on the same footing with any other decree or judgment creditor of the debtor and is entitled to employ the same means to enforce his decree or judgment."

These principles which we have deemed to be thoroughly established seem to have been somewhat shaken by the decision of *Hack v. Snow* in the Appellate Court of Illinois, First District, handed down on February 27, 1929, and reported in 252 Ill. App. 51. The facts briefly were that a decree of foreclosure was rendered on a mortgage in a proceeding to which a judgment creditor having a lien on the title was made a party defendant. A sale was had under the decree of foreclosure and the property was sold at the sale for an amount sufficient to satisfy the mortgage. The owner of the equity during the period

of redemption conveyed to another who was not personally liable to pay the judgment of the defendant judgment creditor. The grantee redeemed within the twelve months and the Court held that the judgment creditor was cut out and his lien was lost. The significant paragraph of the decision reads as follows:

"In order for the defendant Liesik (judgment creditor) to preserve any right he may have had in his judgment against the mortgaged property he should have bid at the foreclosure sale as provided by statute. Having failed to do so, he lost all interest and lien upon the real estate sold in the foreclosure proceeding."

This case stands by itself in Illinois and is directly contrary to several decisions by our Supreme Court. They are: *Davenport v. Karnes*, 70 Ill. 465, and *Burgett v. Paxton*, 99 Ill. 288. In the *Davenport* case the Court said:

"As before said, under the statute upon this redemption the sale became null and void. This being so, the premises were as though no levy and sale had been made and became liable to levy and sale on the execution issued on the larger judgment, as that judgment was a lien upon the premises at the time of the conveyance by the judgment debtor."

In other words the Court held that the redemption within the twelve months reinstates any liens which exist upon the property. Under these decisions the holding in the *Hack* case should have been that redemption by the grantee of the owner of the equity within the twelve months period left the title in said grantee subject to the lien of Liesik's judgment. If the judgment creditor in the *Hack* case had filed a cross-bill and the decree had been on the bill and the cross-bill and had directed a sale to satisfy both the mortgage and the judgment, a decision would have been justified holding that a redemption by the grantee not personally liable for the judgment relieved the title of the judgment lien. If the principle of law laid down in this case prevails, then every second mortgagee must bid at a first mortgage foreclosure sale enough money to pay the first mortgage and his second

mortgage. Otherwise a grantee of the owner of the equity or the owner of the equity if they are not personally liable on the second mortgage will redeem and take free and clear of the second mortgage. This is not the law as we have shown and it is hoped that the Supreme Court will have the opportunity to consider this case and render a correct decision therein.

We pass now to the rights of persons other than the owner of the title to redeem within the twelve months period. We have quoted the statute. Its language is "any defendant, his heirs, administrators, assigns or any person interested through or under the defendant." This is a broad class of persons. But no matter who redeems within the twelve months, the title remains in the owner of the fee and does not change or pass to any one else by virtue of the redemption. Whoever redeems as a defendant within the twelve months period redeems from the sale and pays the amount thereof. The effect of such redemption on the rights accruing to the redemptioner vary with the different defendants redeeming. The rights of the owner of the equity redeeming have already been explained. The rights of a junior encumbrancer redeeming within the twelve months are entirely different from those of the owner. Likewise, the rights of a tenant are different from those of the owner or junior encumbrancer who redeems. The section is so broad that it gives rise to various academic questions. For instance, a party having no interest, yet being a defendant, might be considered as having a right to redeem. If he did, he probably would be a mere volunteer and, of course, would obtain no title as we have pointed out. Under the designation of "any person interested" in the premises, it has been held that a woman having an inchoate right of dower may redeem in salvage of her dower. (*Bigness v. Hibbard*, 267 Ill. 301).

It is easily conceivable that tenants might under certain circumstances re-

deem. For instance, the lessee under a favorable long term lease, subject to a trust deed upon the fee might redeem from a foreclosure in order to preserve the title of his lessor and so prevent his lease being destroyed by foreclosure. He could, undoubtedly, under most leases or in equity withhold the money so advanced for redemption from his future payments of rent and in so doing protect his lease at no ultimate expense to himself.

But next in importance to the redemption by the owner of the fee is the redemption by a junior mortgagee or lienor. We shall, therefore, turn our attention to the rights which flow from such a redemption. Here again we must state at the outset that a junior mortgagee or lienor obtains no title by redeeming from the sale of a prior lien. His sole right is to become subrogated to the rights of the party from whom he has thus redeemed and to add to his own mortgage the amount redeemed and foreclose again for the amount of his mortgage plus the redemption money. (*Illinois National Bank v. Trustees of Schools*, 211, Ill. 500).

An interesting situation arises where a junior encumbrancer redeems from a prior sale but there are intervening junior encumbrancers having liens superior to that of the redeeming lienor. To illustrate this, let us assume there are three mortgages upon a particular piece of property held by "A", "B" and "C". "A" forecloses and "C" redeems from the sale, what are the rights of "B"? The title upon such a redemption remains in the owner of the fee and "C" having redeemed, is subrogated to the rights of "A". "C" thereupon proceeds to foreclose his mortgage plus the redemption money advanced by him. "B", however, can redeem from the foreclosure sale of "C" by merely paying the redemption money advanced by "C" and "B" is not required to pay "C's" mortgage in making such redemption because "C's" mortgage is subordinate to the mortgage of "B". See *Illinois National Bank v. School Trustees*, 211 Ill. 500.

Another interesting situation was decided in the case of *Flachs v. Kelly* and others, 30 Ill. 462. In this case, Theis, owning the property in question, executed two mortgages, the first to Kelly and the second to Flachs. Subsequent to these two mortgages, a judgment was rendered against the owner and in favor of Chatten. The owner of the first mortgage foreclosed his mortgage and the property was sold. The owner of the second mortgage then foreclosed his mortgage and purchased the property at his own sale. He then made a redemption within the twelve months period from the sale under the first mortgage foreclosure. The judgment creditor, after the expiration of the twelve months period from the second mortgage foreclosure sale, tendered to the Sheriff sufficient money to redeem the property only from the second mortgage sale contending that as a judgment creditor, he was entitled to redeem by paying the amount of money for which the property was sold under the second mortgage and need not pay the money advanced by the holder of the certificate of sale to redeem the property from the sale under the first mortgage. The Court held adversely to him and declared that in order to redeem from the sale under the second mortgage, he must pay not only the amount of that sale but also the amount of the redemption money which the second mortgagee advanced to redeem from the first mortgage sale.

It remains now to explain briefly the method of effecting a redemption within the twelve months period. The redemption is made by paying the money to the Master, who thereupon files for record, a certificate of redemption. A redemption may also be effected by purchasing the certificate of sale from the holder thereof and obtaining an assignment thereof. (*Casper National Bank v. Jenner*, 268 Ill. 142). It is better practice to endorse upon the back of said certificate of sale, so assigned, a brief statement of the intention by the owner to

redeem and to record the certificate so endorsed but this is unnecessary except as a matter of notice, and if the certificate is surrendered even though not recorded with the assignment attached thereto, the redemption takes effect as between the parties and as to all parties who may have or may be charged with notice of the facts. (*Casper National Bank v. Jenner*, *Supra*). However, under such a state of facts, if the certificate of redemption is not recorded and a judgment creditor has no actual notice of such an assignment and redemption, he is not bound by the redemption and may after the expiration of twelve months proceed to redeem as if no redemption had been made. (*Boyton v. Pierce*, 151 Ill. 197).

A different situation arises where a junior encumbrancer purchases the certificate of sale issued under the foreclosure of a prior lien. We have shown that he has the right to redeem from a sale under a prior mortgage and by such redemption place the title in the owner of the fee subject to his rights to reimbursement for the redemption money expended, plus the amount due him on his own mortgage. But if he purchases a prior certificate of sale there is no implication that he intended to make a redemption. Of course, in such a case, if no redemption is made from the sale, he will be entitled to a Master's deed at the end of the fifteen months period. But such a purchase of a prior certificate of sale is very unwise because a judgment creditor may redeem after the twelve months, if there has been no redemption within the twelve months. Under this situation, the judgment creditor redeeming after the twelve months would only have to pay the amount necessary to redeem from the sale without taking into consideration the original debt of the junior encumbrancer who has purchased the certificate of sale and the junior mortgagee would lose the amount of his junior mortgage. This precise case was presented to the Supreme Court in *Shroeder*



v. Bauer, 140 Ill. 135 and the Court in deciding this situation and laying down the principles set forth above, said: "But the appellee contends, that by taking an assignment of this certificate of sale, he had in effect redeemed the land and it was then subject to his mortgage, which could not be defeated by a judgment creditor. He is the second mortgagee, and he purchased the elder certificate of purchase, and would have been entitled to a deed under the statute at the end of fifteen months if no judgment creditor had redeemed, and would have thus cut off all subsequent encumbrances. This he had the unquestioned right to do; but, having failed to acquire title in that way, in consequence of the redemption by the appellant, a judgment creditor, he can not now claim that he merely redeemed as the mortgagee of Davenport, and in this way annulled the sale."

One more point with reference to redemption within the twelve months period requires consideration. Quite frequently the owner of the certificate of sale will procure a quit-claim deed from the owner of the fee. This probably constitutes a redemption on the theory of merger but would seem to be subject to the same limitations as if the owner of the fee purchased the certificate of redemption and took no further steps. In such a case, however, it is safer to treat this as a redemption as to subordinate judgments and other liens which may be or may claim to be revived and reinstated by such a transaction.

#### Redemption of Separate Parcels

We next come to the question of redemption where the mortgage conveyed two or more parcels of property. Whether or not separate owners of separate parcels of real estate which have been sold at judicial sale can redeem their specific parcels depends upon the manner in which the premises were sold. If the parcels were sold separately at the judicial sale, the owner of each separate parcel may redeem from the sale of his parcel by paying only the amount for which that particular parcel was

sold. (Robertson v. Dennis, 20 Ill. 313). If, however, the various parcels were sold en masse, they can only be redeemed en masse and neither owner can redeem his separate parcel. Redemption from such a sale can be made only by paying to the Master or to the holder of the certificate of sale, the entire amount for which all of the property was sold. (Oldfield v. Eulert, 148 Ill. 614). In the latter case, if the owner of one parcel redeems, the title to the parcel which he did not own would vest in the other owner and the redemptioner would have only a right of action to collect the proportionate amount of the redemption money.

Having before us the proposition that in case of a redemption within the first twelve months, the title is merely restored to or remains in the owner of the fee, the question of the effect of a redemption by one not entitled to make it presents little difficulty. The only person who may question such a redemption is the holder of the certificate of sale. If he accepts the redemption money no one else can complain. (Blair v. Chamblin, 39 Ill. 521). The owner of the fee, having retained or regained his title by such redemption is not injured and the redemptioner has only a doubtful right of action for reimbursement. Such a redemption even though made by a stranger cancels the certificate of sale and prevents further redemption by judgment creditors.

This, we think, presents most of the problems which arise in connection with redemptions within the twelve months period.

#### Redemption After Twelve Months

At the expiration of twelve months from the date of the sale, the right of redemption of "any defendant, his heirs, administrators, assigns, or any person interested in the premises through or under the defendant" is lost and these parties are absolutely foreclosed. The right of redemption thereafter and until the expiration of fifteen months from the date of the sale is given by the

Statute to judgment and decree creditors. Sections 20 to 26, Chapter 77, Cahill's Revised Statutes, deal with this class of redemptions and it is our purpose now to explain this branch of the subject. Redemptions by judgment and decree creditors are far more complicated than the redemptions made within the twelve months period, and we hope that we may, in some measure, be able to clarify the conflicting decisions and views which exist in this field.

At the outset, let us emphasize that the foundation of a redemption by a judgment or decree creditor is a valid judgment or decree and a valid sale thereunder. Without that, no good redemption can be made. The importance of this is that under this class of redemption, the redemptioner obtains title to the property. Likewise in the case of a decree, no good title can be obtained under a decree unless it is valid and the sale thereunder is valid. The details of the operation of these redemptions will appear as we progress, but these points must be borne in mind throughout the discussion.

The Statute as we have shown grants the right to redeem to judgment and decree creditors. A judgment creditor is altogether different from a decree creditor and the machinery of redemption by one is wholly different from the machinery by which the other may redeem.

#### Judgment and Decree Creditors

The question as to who is a judgment creditor within the meaning of the Statute has frequently received the attention of the Supreme Court. It is obvious that the line must be drawn somewhere. As was stated in *Fitch v. Wetherbee*, 110 Ill. 475, "There must be some limitation as to the particular judgments who are entitled to redeem.—Whose judgment creditors are meant by this Section? Not the judgment creditors of all the world but only the judgment creditors of those who had a right to redeem." It is not necessary to entitle a judgment creditor to redeem that his

judgment should be a lien upon the premises. Thus a holder of a judgment rendered against the mortgagor after he had parted with his title may, nevertheless, redeem from a foreclosure of the mortgage. This was established as early as the case of *McLagan v. Brown* in 11 Ill. 519 and has been many times since adjudicated. (See *Chicago Savings Bank v. Coleman*, 283 Ill. 618. *Garden City Sand Company v. Christley*, 289 Ill. 617. *McRoberts v. Conover*, 71 Ill. 525. *Lloyd v. Karnes*, 45 Ill. 62). But a judgment creditor having a judgment against a person in the chain of title who is not the mortgagor and who has conveyed prior to the foreclosure suit, obtained after the conveyance, cannot redeem. A judgment creditor whose judgment has been discharged in bankruptcy may redeem under the Statute. (*Pease v. Ritchie* 132 Ill. 638). Of course, a judgment which is a lien upon the premises may be the basis of a redemption. A redemption after twelve months and prior to fifteen months is not invalid merely because the judgment creditor was a party to the suit and as such party might have redeemed within the first twelve months period. (*Heinroth v. Frost*, 250 Ill. 102). So too, a judgment creditor having a judgment against a person who died before the judgment creditor could make a redemption may still redeem after the death of the judgment debtor. (*Zeman v. Ward*, 260 Ill. 93) and by virtue of Section 27 of the Judgment Act, persons having claims against a deceased debtor which have been allowed in the Probate Court may, by following the method therein provided, make such redemption, even though such claim has arisen since the death of the deceased debtor, namely, one for funeral expenses. (*Zeman v. Ward*, *Supra*).

In order to entitle a judgment creditor to redeem, it is not necessary that the judgment be rendered prior to the decree of foreclosure. In fact, a judgment entered after the expiration of twelve months from the date of sale and subsequent, therefore, to the time when the

judgment debtor himself might have redeemed is a valid basis for redemption. (*Strauss v. Tuckhorn*, 200 Ill. 75. *Kufke v. Blume*, 304 Ill. 288). It is possible that under the provisions for successive redemptions, a judgment creditor might obtain a judgment more than fifteen months after the sale of the mortgaged property and still have a right to redeem. This interesting situation arose in *Meier v. Hilton* reported in 257 Ill. 174.

It is no bar to a valid redemption that the debtor permitted the judgment to be entered against him for the sole purpose of effecting redemption if the judgment is based on a bona fide debt. (*Kufke v. Blume*, 304 Ill. 288).

If the owner of the title conveys his title within the twelve months period, a judgment creditor having a judgment against the grantee may, upon the failure of his judgment debtor to do so, redeem from the foreclosure. (*Aetna Life Insurance Company v. Beckman*, 210 Ill. 394).

However, in order to entitle a judgment or decree creditor to redeem, he must have such a judgment or decree as would authorize a sale of the premises sought to be redeemed. Thus, a judgment creditor whose judgment has become dormant by the expiration of time so that an execution cannot be sued out upon it, cannot redeem. And a decree creditor whose decree does not authorize a sale of the premises sought to be redeemed cannot redeem. (*DeWitt County Bank v. Mickelberry*, 244 Ill. 77). Thus, the owner of a decree of foreclosure of a junior mortgage directing the sale of premises therein described has a right to redeem as a decree creditor from the sale of the premises under the foreclosure of a prior mortgage and it is not necessary before redeeming that a sale be first made under the junior mortgage decree, nor is it necessary that such decree be a lien.

A decree creditor whose decree authorizes a sale of the premises may redeem the premises to the exclusion of other creditors whose claims are allowed

in the same decree. Thus, if the premises are sold upon a foreclosure of a first mortgage and another foreclosure involving the same premises should proceed to a decree in which several creditors have their respective debts established and a decree entered in their favor, any one of such creditors may redeem as a decree creditor and his redemption operates as if he had obtained a decree in an independent action for his sole benefit and such redemption will not be for the benefit of the other creditors whose debts form part of the same decree. (*Morava v. Bonner* 205 Ill. 321. *Whitehead v. Hall*, 148 Ill. 253).

In a late case, the Supreme Court of Illinois held that a deficiency decree creditor may redeem from his own sale, provided, however, that at the time of deficiency decree was entered, the person primarily liable for the debt was the holder of the title. (*Strause v. Dutch*, 250 Ill. 326). This case is one of the leading cases on redemption in this State and is often cited. The Court carefully distinguished this case from those cases in which the rule was laid down that property could not be twice sold for the same debt, stating that such redemption was not based upon the lien of the mortgage but upon the personal liability of the mortgagor to pay the full amount of the indebtedness secured by the mortgage. The Court said a creditor with such a decree or judgment is on the same footing as any other judgment or decree creditor and is entitled to employ the same means to enforce his decree or judgment.

#### Machinery of Redemption by Judgment Creditors

For the machinery of redemption by judgment and decree creditors, we must turn to the Statute. Section 20, Chapter 77, Cahill's 1927 Statutes, provides that the judgment creditor may sue out an execution upon his judgment or decree, place the same in the hands of the sheriff, who executes it and makes a levy upon the premises desired to be redeemed. The person desiring to re-

deem then pays to the sheriff the amount necessary to redeem the premises from the foreclosure sale. It is important that the amount so deposited be sufficient to pay the decree with interest thereon at the rate of six per cent per annum. In this connection, the provisions of Section 28 of the Judgment Act must be considered. This Section provides that the holder of the certificate of sale may pay all taxes and special assessments which are or may become a lien on the real estate during the period of redemption. When he has done so and has deposited his receipts with the master, the redemptioner must reimburse him before he is entitled to redeem. In all cases of redemption, therefore, the master who made the original sale must be consulted in order that the deposit shall be great enough to cover these additional items, if any there are. Otherwise, the holder of the certificate could rightfully refuse the money tendered and at the end of fifteen months insist upon a deed from the master. Of course, if the holder of the certificate accepts the redemption money, he cannot later complain that it is inadequate. When the proper amount has been deposited with the sheriff or other proper officer, he then advertises and offers the premises for sale as in other cases of sale on execution. The sale is by virtue of the redemption and pursuant to the execution. At such sale, the redeeming creditor is considered to have bid the amount of such redemption money so paid by him with interest, and if no greater bid is received the judgment creditor is immediately entitled to a deed and no further redemption is allowed. If, however, a bid is received greater than the amount of such redemption money, the property is sold to the highest bidder and the purchaser receives another certificate of sale from which any judgment creditor may redeem within sixty days. This is provided for by Section 23, the language of which is that: "Successive redemptions may be made of the premises at any time within sixty days of the last sale at which they

were sold for more than the amount of the redemption money, interests and costs and the premises again sold in the same manner and upon the same terms and conditions, and certificates shall be made in like form and manner as upon the sale on the first redemption, and the person redeeming shall be considered to have bid the amount of his redemption money, interest and costs; and if at any such sale the premises are not sold for a greater sum, the sheriff or other officer shall forthwith execute a deed to the purchaser, and no other redemption shall be allowed."

Under this Section, it is possible that successive redemptions may extend the period of redemption many months beyond the fifteen months period. For instance, if at the first redemption sale more than the redemption money is bid, the sheriff does not issue a deed, but issues a certificate of sale to the purchaser at the redemption sale. From the time of this sale, there is a further sixty day period of redemption. If, within that period, another judgment creditor redeems, he proceeds in exactly the same manner as the first creditor and again a sale is conducted by virtue of the redemption and the execution of the second creditor. If, at this sale, more than the redemption money is bid, the same process is again gone through. This continues until either one of two things happens. First, if at the redemption sale, no more than the redemption money is bid, a deed is issued forthwith. Secondly, if the sixty day period of redemption expires without a further redemption being made therefrom, a deed is issued to the purchaser. When either of these two events happen, all further rights of redemption terminate.

#### Machinery of Redemption by Decree Creditors

The machinery of redemption by decree creditors is different from the machinery of redemption by a judgment creditor. The difficulty with the redemption by a decree creditor is that the statute fails to outline the manner in which he shall

proceed. The language of the Statute (Section 20) is important to note. It is that "any judgment or decree creditor, his executors, administrators or assigns may, after the expiration of twelve months and within fifteen months after the sale, redeem the premises in the following manner: Such creditor, his executors, administrators, or assigns may sue out an execution upon his judgment or decree, and place the same in the hands of the Sheriff or other proper officer to execute the same, who shall endorse upon the back thereof a levy of the premises desired to be redeemed." The statute as may be seen is wholly inapplicable to a redemption by a decree creditor. A decree creditor cannot sue out an execution and levy on property. The procedure for redemption by a decree creditor has, in fact, been outlined by our Supreme Court in the case of *Whitehead v. Hall*, 148 Ill. page 253, which is the only case on this subject. There the Court held that a decree creditor may redeem from a prior sale by depositing the redemption money with the Master who is named in his decree to sell the property described in his decree. The Master, upon the receipt of the redemption money proceeds to sell under the decree held by the redeeming decree creditor. From this point the procedure is the same as in the case of redemption by judgment creditors. At the sale, of course, any one may bid and it will be considered that the decree creditor bid the amount of the redemption money. If no more than the redemption money is bid the Master issues a deed forthwith to the redeeming decree creditor. If more than the redemption money is bid then the Master issues a certificate of sale and there is a sixty day period for further redemptions. When this sixty day period has expired and no further redemption has been made the Master issues a deed to the redeeming decree creditor.

#### Preferences in Redemptions

A redemption by a judgment creditor cuts out judgments and other encum-

brances even though they were prior to the judgment upon which such redemption is made. In this respect, this kind of redemption is materially different from a redemption made within the twelve months period. Thus, a judgment creditor under a judgment rendered fourteen months after the foreclosure sale might by such redemption obtain the title to the property free and clear of prior judgments and other encumbrances in favor of persons who have not elected to redeem. The effect of such redemption is to transfer to the redeeming creditor all rights belonging to the original purchaser at the time the redemption is made so that if the judgment is regularly obtained and will support a sale and deed, the judgment creditor who redeems obtains the same title which the original purchaser would have obtained under a deed issued by the Master. (*Sutherland v. Long*, 273 Ill. 309).

The statute, however, affords ample protection for senior judgment creditors against a redemption by a junior judgment creditor which would cut off their judgments. Section 24 of the Judgment Act (Chapter 77, Cahill's Statutes) provides that each judgment creditor has two days immediately following the expiration of the twelve months period in the order of their priority within which they may redeem. So that if there are six judgment creditors who are entitled to redeem from a foreclosure sale, each one of them has two days in which his right to redeem is paramount to the right to redeem of any other judgment creditor in the order of their seniority, the senior judgment having the first two days and the second one the next two days etc. If a creditor, being for instance, the fifth creditor, should make redemption on the first day after the end of the twelve months period his certificate is subject to the rights of creditors Nos. 1, 2, 3 and 4 to redeem within the two days allotted to each of them. This they may do by paying the amount of the foreclosure sale plus interest and

cost as if the redemption had not been made by creditor No. 5. (See *Chicago Savings Bank v. Coleman*, 283 Ill. 611). This is a leading case on preferences of redemption and suggests a very interesting question. It was held that the date of priority of the judgment was governed not by the date of the rendition thereof but by the date upon which said judgment became a lien. Thus in this case, it was decided that a judgment rendered in Cook County but upon which no transcript was filed in Sangamon County until after the rendition of a judgment in Sangamon County was inferior in point of time to the Sangamon County judgment which was rendered subsequent to the one in Cook County. This case is in conflict with the numerous decisions which hold that a judgment need not be a lien to be the basis of a valid redemption.

#### Effect of Redemption by Judgment and Decree Creditors

Until the redemption money is posted, a judgment creditor has no right other than to demand payment of his judgment and the holder of the certificate of sale may, by paying his judgment, deprive him of his right of redemption. If, however, a judgment creditor posts his redemption money with the proper officer, the holder of the certificate of sale or any other party interested cannot prevent a redemption being made by him by tendering to him the amount of his judgment. Having posted the redemption money and thus made a binding bid for the property when it is offered for sale under and by virtue of his redemption and his execution the judgment creditor acquires a right of which he cannot be divested, except with his consent. (*McGowan v. Goldberg*, 281 Ill. 547). The posting of the redemption money does not in itself complete the redemption and if, with the consent of the judgment creditor, the holder of the certificate pays his judgment, the holder of the certificate will be entitled to a deed at the end of fifteen months. (*Sutherland v. Long*, 273 Ill. 309). The

Court in this case said: "Pending redemption proceedings by a judgment creditor, the holder of the certificate of purchase is not stripped of his rights and his interest in the premises, and his certificate of purchase is not extinguished until he actually accepts the redemption money or until valid redemption proceedings have finally culminated in a deed."

We have seen that to entitle a judgment creditor to redeem after the twelve months period, he must have a valid judgment upon which a valid sale may be made. If, before he makes a redemption, the judgment creditor causes the real estate to be sold to satisfy his judgment, what then is his right to redeem? If he causes a sale to be made of property other than the property sought to be redeemed, he thereby loses his status as a judgment creditor and cannot redeem as a judgment creditor. He must redeem, if at all, as a defendant within the twelve months period. If that period has expired, he cannot redeem at all because his judgment has been satisfied by the sale of property. This is the rule, also where the judgment creditor before making a redemption causes the property from which he later seeks to redeem to be sold to satisfy his judgment. His only right to redeem would then be within the twelve months period. His right to redeem as a judgment creditor will have ceased. He is no longer a judgment creditor. His judgment has been satisfied by the sale of property. If he allows the twelve months period to elapse, his right to redemption is gone.

The effect of redemptions upon a homestead estate is interesting and again illustrates the difference between a redemption within twelve months and a redemption after twelve months. If, for instance, a mortgage is foreclosed in which the homestead was waived, a redemption within the twelve months would reinstate the homestead estate. The situation is altogether different when a judgment creditor redeems after the twelve months. While it is true his title is

based upon his judgment and a sheriff's sale and deed thereunder which ordinarily would not cut out the homestead estate, yet by virtue of the redemption as a judgment creditor he receives the benefits which the original mortgagee acquired in his original decree of foreclosure, so that if the homestead was waived in the mortgage and the homestead of the mortgagor was thereby foreclosed, the judgment creditor making a redemption under his judgment takes title free and clear of the homestead of the owner by virtue of the original foreclosure. (Schroeder v. Bauer, 140 Ill. 135). This difference is aptly expressed in *Butler v. Brown*, 205 Ill. 606 at page 609 "Appellees (being the mortgagors) by their mortgage to Jane Hand had made this release of homestead as provided in this Section and it was therefore included in the foreclosure sale of August 19, 1901. From that sale, however, the appellant (the holder of the certificate of sale) could redeem by virtue of Section 18 of our Statutes as one interested in the premises, the only effect of his redemption, as provided in that Section, being to render null and void the sale and certificate of the Master. No greater right is conferred by that Section. If he had redeemed as a judgment creditor, as provided by Sections 20 to 24 of the same Chapter, the right acquired would have related back to the judgment or decree from which the redemption was made, and would be paramount to any title acquired subsequent to the beginning of the lien of such judgment or decree and would, in this case, have covered the homestead rights of the appellees."

In order that the redemption by the judgment creditor be a valid one, it is necessary first that the foreclosure proceedings from which redemption is made be valid. Even though the judgment is valid, if the foreclosure is invalid, the redemption by the judgment creditor is void and no title will be acquired thereby. (*Mulvey v. Carpenter*, 78 Ill. 580).

It is necessary also that the judgment upon which redemption is made be

against the holder or former holder of the entire title. Thus, a redemption by the holder of a judgment against a life-tenant gives to such judgment creditor, the interest of the life-tenant only. (*Schroeder v. Bozarth*, 224 Ill. 310). Where two parcels are sold en masse and the ownership is in separate persons, a judgment creditor of one of them upon redemption from a foreclosure of both parcels acquires title only to the lot owned by his judgment debtor. (*Huber v. Hess*, 191 Ill. 305). Likewise a judgment creditor having a judgment against the holder of an undivided one-half of the title obtains upon redemption from a sale of the whole title, title only to the undivided one-half against which his judgment was effective. (*Sledge v. Dobbs*, 254 Ill. 130).

Let us consider finally the effect of an invalid redemption. This situation was thoroughly discussed in two cases decided by the Supreme Court, namely, *Sutherland v. Long* 273 Ill. 309 and *Hutson v. Wood*, 263 Ill. 376. In the *Sutherland* case, the Court while deciding that the judgment creditor did not make an invalid redemption in the case before it, stated the following principles: "If, after the expiration of the twelve months, the premises are redeemed by one not a judgment creditor, the acceptance of the redemption money by the holder of the certificate of purchase relieves the legal title of the debtor from the lien of the certificate of purchase even though the one redeeming cannot enforce his claim by a resale of the land. Upon the acceptance of the money by the holder of the certificate, all his interests would have been extinguished immediately whether the judgment creditor had the right to redeem or not." In *Hutson v. Wood*, 263 Ill. 376 the Court summed up at length the law upon this subject in a splendidly written opinion and decreed the return of the redemption money which had been paid for an invalid redemption, saying: "The rule of caveat emptor applies to sales upon execution and judicial sales, and we know of no

case where a purchaser at such a sale, in the absence of a statute, has been enabled to recover the money paid, either for a defective title or where for want of power to make the sale he has acquired no title. The power of a sheriff to sell land upon execution and to convey the land sold is statutory and depends upon the validity of the process, which, in turn, must be based upon a valid judgment. If the judgment is void, the execution, sale and deed are necessarily void. Neither in law or equity can a court aid the defective execution of a power conferred by law whereby the title of one person's property may be transferred to another. Wood and Stotlar acquired no title by virtue of the sheriff's sale and deed and have therefore no defense which they can interpose to a suit for the possession. (*Meyer v. Mintonye*, 106 Ill. 414). They did, however, purchase at the void sale in good faith, in the belief that they were obtaining a good title and the money they paid extinguished the certificate of sale under the foreclosure proceedings. It is contended, on the one hand, that they are entitled, in equity, to be reimbursed the amount of the encumbrance from which the land was relieved by their payment before they can be deprived of its possession. On the other hand, it is insisted that they are volunteers, and having advanced their money voluntarily on the faith of a void sale must abide the consequences and are entitled to no relief. So far as the partition suit involving Lot 23, in which Mrs. Hutson is complainant and is asking to have the sale removed as a cloud upon her title, is concerned, there can be no doubt of the power of the court to compel her, as a condition to granting the relief asked to reimburse Wood and Stotlar for the amount paid to relieve her land of the encumbrance. She is seeking equitable relief, and, under the doctrine that he who seeks equity must do equity, may be compelled, before relief will be granted, to do what equity requires of her. This principle is constantly ap-

plied in suits brought to set aside void tax deeds, and the same rule applies to a suit to set aside a deed upon a void execution sale."

It is to be noted here, however, that the purchasers at the sale made pursuant to the redemption were not parties to the judgment and the Court stressed the fact that they were innocent purchasers. It is doubtful whether or not the Court would make a similar decision in a case where the judgment creditor himself was the purchaser at the redemption sale. It seems to us that he should be protected just as fully as third parties bidding at the sale for the reason that his money has gone to extinguish the certificate of sale and certainly any one asking for equitable relief against him should be required to do equity for him just as much as for a third party.

This principle of reimbursement, however, is quite different from the rule laid down where a judgment is effective as to part and invalid as to part as, for instance, against one of two co-owners. In *Sledge v. Dobbs*, *Supra*, the Court specifically denied any claim for contribution saying that the judgment creditor was presumed to have made the redemption in order to acquire the title of his judgment debtor and the fact that he incidentally freed the property of his judgment debtor's co-owner from the lien of the foreclosure sale gave him no rights whatever in the title of said co-owner.

#### Redemption by a Co-Tenant

Section 26 of the Judgment Act (Chapter 77 Cahill's Statutes) provides that any joint owner, his executors, administrators or assigns or a decree or judgment creditor of such joint owner may redeem the interest of such joint owner in the premises sold on execution or decree in the manner and upon the conditions specified in the statute upon the payment of such proportion of the amount which would be necessary to redeem the whole. Thus, if the title is in two tenants in common during the twelve months period, either one of them may redeem his undivided one-half



interest from the sale by tendering one-half of the amount of the sale, costs, and interests. He would thereupon be entitled to his undivided one-half while the purchaser at the end of the period, if no further redemption was made, would be entitled to a deed to an undivided one-half. Within the twelve months period, however, a co-tenant who redeems all of the property redeems for the benefit of all of his co-owners and while entitled to contribution from them is not entitled to make such redemption for his own sole benefit. (*Donason v. Barbero*, 230 Ill. 138). This seems simple and probably would be simple were it not for a decision rendered in *Sledge v. Dobbs*, 254 Ill. 130. In this case, the title to the property in question was in Sophronia A. Sledge and her husband, Joseph. They executed a mortgage which was foreclosed. Twelve months having expired, a judgment creditor of Joseph Sledge made a redemption of the premises under and by virtue of which the property was sold, and a Sheriff's Deed issued. Of course, since the judgment was only upon the undivided interest of the husband, there seems to be no doubt that the Sheriff's Deed based on such redemption could and did convey only such undivided interest. However, the Court made the following statement which can hardly be reconciled with the language of Section 26 of the statute: "There was no obligation upon the judgment creditors of Joseph J. Sledge to redeem the land from the mortgage sale. It is true if they redeem at all they will be required to pay the whole amount the land sold for, and this would free the land from any lien on account of said mortgage sale." In this case, it was decided that a redemption having been made by paying all of the redemption money, the interest of Sophronia was freed from the mortgage debt and she retained her fee title free and clear not only of the lien of the certificate of sale but even of the necessity to contribute to such judgment creditor for any portion of the redemp-

tion money. In view of the language of Section 26, we hesitate to agree with the statement that the judgment creditor was forced to redeem in full in order to make a redemption of an undivided interest. The case is undoubtedly correct to the extent that it holds that if a judgment creditor of one co-tenant pays the redemption money in full, he acquires only the title of the co-tenant against whom he holds a judgment and the title of both co-tenants is completely freed from the lien of the mortgage sale. (*Sutherland v. Long*, 273 Ill. 309 at page 315).

In favor of the right of a judgment creditor of one co-tenant to redeem by paying only a proportionate share of the redemption money, the case of *Schuck v. Gerlach*, 101 Ill. 338 seems to point out a more sensible rule to be applied in this kind of a case. The facts were that the mortgagor died, and his heirs, five in number became seized of the equity of redemption by descent. After foreclosure and sale, they having failed to redeem, creditors having judgments against two of them each redeemed an undivided one-fifth by tendering one-fifth of the redemption money. When this had been completed, a third creditor having a judgment against the deceased mortgagor whereby he was entitled to redeem the entire premises, attempted to make a redemption by tendering the entire redemption money. The Court held that the redemptions by the two creditors having judgments against two of the heirs were valid and that the creditor of the mortgagor was entitled to redeem and acquire by his redemption only the remaining undivided three-fifths. Therefore, with reference to property owned jointly, it seems to be the law, (1) that a creditor of each co-tenant may redeem the share of the co-tenant against whom he holds a judgment by depositing the proportionate share of the redemption money. (2) If, however, in error the judgment creditor deposits the entire redemption money, the remaining co-tenants against whom he has no judgment regain their

title freed from all lien created by the foreclosure sale and the redeeming creditor is not entitled to contribution. (3) A redemption by one creditor of one co-tenant is no bar to a redemption of the balance of the title by another creditor having a judgment against the holder of the balance of the title with which he might redeem the remaining portion from such a sale. (4) Within the first twelve months, a co-owner may redeem his share without redeeming the whole but if he does redeem the whole, he does so for the joint benefit of all the owners and while entitled to contribution is not entitled to the entire title.

#### Redemption by a Claimant Under a Claim Filed in the Probate Court

Section 27 of the Judgment Act provides that any person having a claim in the Probate Court against the estate of a deceased debtor shall be considered a judgment creditor. Redemption in such a case is quite similar to the redemption of a judgment creditor and this Section authorizes the issuance of a special execution by the Clerk of the Probate Court, directed to the Sheriff, authorizing him to levy on and sell the property from which redemption is sought. The holder of this execution is in the same position from this period on as the holder of an execution under a judgment.

As stated above, any claim properly allowed may be the basis of such redemption, even though the claim was one arising subsequent to the date of the death of the debtor, as for instance, one arising for the funeral expenses of the debtor. The case of *Zeman v. Ward*, 260 Ill. 93 is probably the best one upon redemptions under claims in the Probate Court. In *Zeman v. Ward*, *Supra* it was urged that the claimant before being permitted to make a redemption should file a petition, give notice to the heirs and allege the insufficiency of the personal assets to pay all claims against the estate as in the case of the proceedings in the Probate Court to sell the real estate of the decedent to pay debts. The Court, however, held that none of these things

was required by the Statute and that the Statute does not make the right to redeem contingent upon the insolvency of the estate or the insufficiency of the personal assets and does not require a petition to the Court or notice to any one.

#### Effect of Redemption on Rents, Issues and Profits

In the absence of any express provision in a trust deed or mortgage sought to be foreclosed, the rents, issues and profits during the period provided for redemption, belong to the owner of the fee, that is, the owner of the right to redeem. (*Standish v. Musgrove*, 223 Ill. 500). This is based upon the theory that the holder of the certificate of sale has no interest in the premises foreclosed except the right either to the return of his money by redemption or to a deed to the premises at the expiration of the statutory period of redemption.

It has long been the law that the owner of the indebtedness upon which foreclosure is sought may also file a petition to have a receiver appointed to manage and control the mortgaged property without any specific authority to do so in the trust deed. Whether or not a receiver should be appointed rests within the discretion of the Court and depends primarily upon the proof that the property was scant security for the mortgage sought to be foreclosed. (*Orlengen v. Rice*, 104 Ill. App. 428). This remedy, however, was more or less uncertain since it depended upon the discretion of the judge presiding at the hearing. To overcome this, the modern form of trust deeds almost universally contains a provision to the effect that pending foreclosure proceedings, a receiver may be appointed. Under such a grant of authority a receiver may be appointed without regard to the solvency of the mortgagor or the security of the property. (*Bagley v. Illinois Trust and Savings Bank*, 199 Ill. 76). If, pursuant to such foreclosure proceedings the property is sold and upon such sale the full amount of the decree is obtained, the owner of the right to redeem may peti-

tion to have the receiver discharged since there is no longer need for him, the mortgage having been paid in full by the sale. (*Davis v. Dale*, 150 Ill. 239. *Bogardus v. Moses*, 181 Ill. 554).

A different question arises, however, when there is a deficiency found due the mortgagee after the sale of the premises. In the absence of any provision pledging the rents, issues and profits of the property during the period of redemption, the mortgagee is not, as a matter of right, entitled to receive the rents during such period, such relief depending upon the discretion of the Court. (*Ball v. Marske*, 202 Ill. 31. *Schaepfi v. Bartholomae*, 217 Ill. 105). To avoid this situation, the modern form of trust deed contains a pledge of such rents, issues and profits during the period of redemption as further security for the mortgage debt. Such a pledge is valid and under it the Court has authority to continue the receiver in possession of the premises during the statutory period of redemption. Thus, if a redemption is made by one not personally liable for the deficiency and if the rents are pledged in the mortgage and if, in addition, the decree orders the continuance of the receivership, such receiver could probably collect the rents, issues and profits during the entire fifteen months applying them upon the deficiency even though there has been a redemption from the sale. (*Oakford v. Robinson*, 48 Ill. App. 270). Still another question arises. May a receiver be continued after redemption if notwithstanding a pledge of rents in a mortgage the decree of foreclosure fails to provide for the collection of the rents to satisfy any deficiency there may be? Upon this point the law is less certain, but the answer to the question seems to depend not merely upon the holder of the right to redeem being personally liable for the deficiency, but also whether or not the holder of the right to redeem purchased the same before or after the entry of the decree of foreclosure. Under the decision in *Lightcap v. Bradley*, 186 Ill.

510 as we have seen all the rights of the mortgagee merge in the decree of foreclosure and subsequent purchasers need look only to the decree to determine the condition of the foreclosure. From this it would seem to follow that if subsequent to the decree a person not liable for the deficiency should purchase the right to redeem and redeem, he would be entitled to have the receiver discharged immediately notwithstanding the trust deed foreclosed contained an express pledge of rents and profits. However, an entirely different situation arises if he purchased prior to the decree of foreclosure, even though he is not liable primarily for the debt, for in this case it would probably be held that he purchased the property subject to the mortgage and to all of its terms and the subsequent omission in the decree might not relieve him of the pledge of rents. If in such a case, a receiver is appointed during the foreclosure proceedings, he probably can continue to collect the rents pledged in the mortgage and apply them upon the deficiency decree even though redemption is made before the fifteen months period expires by one not liable for the deficiency. (*Oakford v. Robinson*, 48 Ill. App. 270). In this case, the Court said: "Appellee's title to the property was subject to the mortgage and his right to the rents and profits of the land was, under the mortgage and decree of Court, secondary to that of the appellants (mortgagees). The payment by the appellee to the Master in Chancery of the amount requisite under the Statute to effect redemption from the sale did not operate to destroy the lien of the appellants and such lien remained unaffected by the redemption and could only be satisfied by the payment of the deficiency or by the application by the receiver of the rents and profits toward the payment of such unpaid balance." This decision has been several times cited with approval and in *Owsley v. Neeves*, 179 Ill. App. 61, the Court said: "Rents and profits are the subject of mortgage. The mortgagee has a specific

lien upon the rents and profits of mortgaged land when they are expressly pledged by the mortgage as part of the security. The appellant was bound by those terms of the trust deed and the chancellor could not legally or equitably decree otherwise than that the appellees were entitled to have their deficiency decree or judgment paid out of the rents in question." To the same effect is *Townsend v. Wilson*, 155 Ill. App. 303. This being the uncertain state of the law, it would be unsafe to assume that a redemption terminates every receivership. Where the rents are specifically pledged in the trust deed foreclosed, it is probable that our Courts will permit the receiver to remain in possession for the full fifteen months, notwithstanding a redemption by one not liable for the payment of the deficiency decree.

#### Redemption Under Section 19 of the Chancery Act

In addition to the statutory rights of redemption heretofore discussed another right of redemption exists from all sales made under and by virtue of decrees in chancery in favor of defendants served by publication. The importance of this right of redemption is not fully appreciated by Illinois lawyers nor is there a proper understanding of the serious effect upon the marketability of titles and the collectibility of mortgages or other liens which must be enforced in equity. In the majority of cases of foreclosure of liens in the City of Chicago there exists a three year right of redemption in favor of some of the defendants to the suit for reasons which will appear as we progress. The result is that it actually takes three years or more to make a collection of the money due on a mortgage or mechanic's lien. There are upon our Statute Book several Sections (Sections 7 and 12, Chapter 22, Cahill's Illinois Statutes) which provide for suing persons who have or may have an interest in the property which is the subject matter of the suit where such persons reside beyond the boundaries of this State or cannot be found. Such persons may be sued

and brought before the Court by the publication of a notice in the manner prescribed by the Statute. In case there are persons who have or may have an interest in the property which is the subject matter of the suit, whose names are unknown, they may be made defendants by the designation of "unknown owners," and publication may also be made against them to bring them before the Court. In Illinois and particularly in Chicago and its suburbs it has long been the practice to lend money on real estate, taking as evidence of the debt, notes payable to bearer which are secured by a trust deed running usually to a corporate trustee. Nothing appears on the records showing the ownership of the notes and trust deed. If, therefore, there are two or three trust deeds on a piece of property, the holder of the first trust deed seeking to foreclose it must make parties defendant not only the trustee in the subordinate trust deeds, but also the owner of the notes. Since the record does not show the ownership of the notes and the trustee seldom knows the facts the complainant is driven to make the owners of such notes defendants by the designation of unknown owners of notes. He proceeds to a decree of sale and we come then to the rights of these unknown owners to redeem. Section 19 of the Chancery Act, Chapter 22, Cahill's Statutes provides that "when any final decree shall be entered against any defendant who shall not have been summoned or been served with a copy of the bill or received the notice required to be sent him by mail and such person, his heirs, devisees, executor, administrator or other legal representatives, as the case may require, shall within one year after notice in writing given him of such decree or within three years after such decree, if no such notice shall have been given as aforesaid, appear in open Court and petition to be heard touching the matter of such decree, and shall pay such costs as the Court shall deem reasonable in that behalf. The person so petitioning may appear and answer the complainants'

bill, and thereupon such proceedings shall be had as if the defendants had appeared in due season, and no decree had been made. And if it shall appear, upon the hearing, that such decree ought not to have been made against such defendant, the same may be set aside, altered or amended as shall appear just; otherwise the same shall be ordered to stand confirmed against said defendant." The statute is absolutely silent on the matter of redemption. The language of the statute would seem to limit the right of the parties served by publication to having the decree reviewed and modified or vacated, if upon their defense the Court should deem that relief proper. But our decisions leave no room for doubt that the Statute grants an absolute right to redeem within three years from the date of the decree regardless of whether or not the decree was altered or amended. See *Seymour v. Bailey*, 66 Illinois 288. *Northern Trust Company v. Sanford*, 308 Illinois 381. It has become the habit of many lawyers to add to the list of defendants in foreclosure suits not only "unknown owners of certain notes specifically described," but "unknown owners" generally. Their idea, as we gather it, is to be sure every one is before the Court and that thereby a perfect proceeding is being conducted. We have encountered many cases where there was no necessity whatever for making unknown owners defendants. That is, there were no Junior Trust Deeds and nothing of record to require it, and yet "unknown owners" were sued. The result of such procedure is to create a three year period of redemption which would otherwise not exist at all, thereby making the title practically unsalable for three years and postponing the collection of the debt for a like period. This is very unwise practice and should be discontinued. Likewise we have often seen cases where non-resident persons have been served by publication in foreclosure cases when it was possible to serve them by copy of the bill. Had they been served in that manner their right of redemption would have

expired at the end of 15 months from the date of the sale. But because they were published against their right to redeem extended during 3 years from the entry of the decree.

Such is the three year period of redemption under our Laws and it is hoped that the money lenders who suffer the most from laws which make it difficult for them to collect their loans will sometime seek relief by appealing to the Legislature for a modification of this Section of our Statute.

#### Conclusion

We have, we believe, discussed all the important problems which arise in this difficult branch of Real Property Law. There are, of course, many minor points which have not been touched upon and there are many decisions which have not been cited. Our only hope is that this essay may prove to be of some value to those who may find occasion to stray in this labyrinth of law.

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# Homecoming Luncheon

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YOUR  
RESERVATION

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IS IT IN?