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Gordon B. Wheeler
Member of the Grand Rapids, Michigan, Bar

Edgar N. Durfee
University of Michigan Law School

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Gordon B. Wheeler * *and Edgar N. Durfee* †

FOR reasons political, social and economic which have never been fully analyzed, the moratory legislation of the last five years has shown special favor to the debtor whose obligation is secured by mortgage of land, and this legislation is faintly echoed in moratory decisions which have no direct statutory foundation. Granted that contracts have sometimes received similar treatment, that banks and insurance companies have also enjoyed indulgence, and that the new chapters of the Bankruptcy Act extend asylum to all and sundry, yet the mortgage is so far favored that the word "moratorium" brings to mind this case before all others.

Whether by accident or by design, it is difficult to say which, the mortgage legislation frequently stops with relief which interferes with the normal process of foreclosure, as by postponing decree or sale, or by granting or extending the privilege of redemption from the sale, or by introducing the practice of upset price. Often there is no attempt to circumscribe the personal remedies of the mortgagee, and in at least one case the legislative effort to do so cracked up on the Constitution.[1] This situation gives new point to the question how far the mortgagee's personal remedies can serve as an effective substitute for foreclosure, a question which has not been of prime importance in the past and for this reason has not received much attention.

First of all, it should be observed that an attempt by a mortgagee to collect upon the personal obligation of the mortgagor might be condemned as an "evasion" of the moratory statute, even though the statute does not in its terms go further than to restrict the remedy of foreclosure.[2] This position would be particularly plausible with respect

* Member of the Grand Rapids, Michigan, Bar. A.B., Albion College; J.D., Michigan.—*Ed.*

† Professor of Law, University of Michigan. A.B., Harvard College; J.D., Chicago. Author, CASES ON MORTGAGES; CASES ON EQUITY.—*Ed.*

[1] First Nat. Bank v. Durham Lumber Co., (Wis. 1934) 256 N. W. 783; Hanauer v. Republic Bldg. Co., (Wis. 1934) 256 N. W. 784.

[2] Such a contention was denied in Farmers & Bankers Life Ins. Co. v. Brown, 140 Kan. 458, 36 Pac. (2d) 960 (1934), and Becker v. Detroit Savings Bank, 269 Mich. 432, 257 N. W. 853 (1934), noted in 14 MICH. S. B. J. 179 (1935).

to any effort of the mortgagee to use the personal remedy in such way as to subject to satisfaction of the debt the very land which he is precluded from reaching by the normal method of foreclosure. It is well, however, to remember the judicious words which were uttered by Mr. Justice Holmes in a case involving the application of an inheritance tax statute to a trust which had been created *inter vivos* but was alleged to have been made in contemplation of death. He said: "We do not speak of evasion, because, when the law draws a line, a case is on one side of it or the other, and if on the safe side is none the worse legally that a party has availed himself to the full of what the law permits. When an act is condemned as an evasion what is meant is that it is on the wrong side of the line indicated by the policy if not by the mere letter of the law." [3] In the case in hand, the question is whether the policy of the moratory statute is violated by prosecution of the personal action. That is the question hinted at in the opening line of this paper: What is the reason for singling out the mortgage case for special treatment? The writers are not prepared to answer that question, and therefore are not prepared to say whether the proposed procedure is a violation of the spirit of the moratory statutes. They believe, however, that it is unnecessary to answer that question because there are other obstacles to fruitful prosecution of the personal remedy.

I

PERSONAL ACTION WITHOUT FORECLOSURE: LEVY ON EQUITY OF REDEMPTION

Moratoria aside, the mortgagee still has, in most of our states, his ancient privilege of holding his security in abeyance and suing on the personal obligation of the mortgagor.[4] The acute question, of course, concerns the fruits of the judgment. If general assets can be found, all is well. But the defaulting mortgagor usually has no property subject to execution unless it be the mortgaged land. This throws up the question: Can process be levied on the equity of redemption?

Without exhausting the authorities, one can safely say that the equity of redemption in mortgaged land is everywhere subject to execution, or to some other process (failing all else, a judgment creditor's bill), upon a judgment recovered by a third person, or upon a judgment recovered by the mortgagee on a debt other than that which

[3] Bullen v. Wisconsin, 240 U. S. 625 at 630, 36 Sup. Ct. 473 (1916).

[4] 3 JONES, MORTGAGES, 8th ed., sec. 1572 *et seq.* (1928).

is secured by the mortgage.[5] In either case, the mortgagee may purchase at the sheriff's sale. Such a purchase is not subject to that scrutiny which is applied to "voluntary" release of the equity of redemption, for the very good reason that, at this public sale conducted by an officer of the court, the mortgagee has no opportunity to overreach the mortgagor and take undue advantage of his economic weakness. *Per contra*, to permit him to purchase on the same terms as any stranger adds one (and a most important one) to the potential market for the land, to the advantage of the mortgagor as well as the mortgagee.[6]

With facts varied in but one point, that the judgment was based on the debt secured by the mortgage, it seems always to have been felt that execution sale of the mortgaged land was out of order. There has, however, been notable lack of agreement as to the reason for condemning this procedure, and difference of opinion as to its consequences. Divergence in reasoning is chiefly due to the employment of the familiar method of assuming validity, *arguendo*, and then pointing to the untoward consequences which would follow. That has caused confusion because validity has been assumed on several different bases: (1) It is assumed that the sale would operate like an execution sale under any other judgment, viz., giving title subject to the lien of the mortgage for the whole mortgage debt (ignoring or denying application of the proceeds of sale in satisfaction of the mortgage lien) from which it is said to follow that the proceeds of sale should go to the mortgagor, not to the mortgagee, or, the proceeds going to the mortgagee, the mortgagor must be subrogated to the lien of the mortgage, all of which is obviously absurd. In working out this analysis, it may be thought necessary to differentiate between purchase by mortgagee, purchase by mortgagor, and purchase by a third person, which complicates the absurdity. Further confusion is created by the employment of two sets of assumptions, one for common law and the other for equity.[7] (2) It is assumed that the sale operates like any other execution sale

[5] 23 C. J. 345 at 348 (1921).

[6] Such purchase of the equity of redemption by the mortgagee may, of course, operate as a discharge of the personal obligation of the mortgagor, at least to the extent of the value of the land. Note, 29 A. L. R. 1318 (1924). Discharge in such cases may be put on the technical ground of merger of estates. Or it may be rested on elemental justice, since the mortgagee would otherwise be paid twice, once by appropriation of the mortgaged land and again by collecting on the personal obligation. Or the result may be rested on the general principle of policy governing public sales, that all bidders should be on the same footing.

[7] See McNair v. O'Fallon, 8 Mo. 188 (1843); Tice v. Annin, 2 Johns. Ch. (N. Y.) 125 (1816); Camp v. Coxe, 1 D. & B. (18 N. C.) 52 (1834).

of an equity of redemption except that the proceeds of sale are to be applied on the mortgage debt, extinguishing the mortgage lien *pro tanto*. This avoids the absurdity of the previous assumption, but it is evident that on this basis as well as the other no one except the mortgagee himself can bid anything unless he is prepared to pay, ultimately, the whole amount of the mortgage debt. Since substantial excess of value over debt is inconsistent with default (to be more exact, one should say that it is abnormal in case of a default so serious as to engender collection proceedings), it follows that the mortgagee will be able to bid off the equity of redemption without the competition which is theoretically the life of a public sale.[8] The consequent hardship upon the mortgagor might be mitigated by using the doctrine of merger to work a discharge of the personal obligation of the mortgagor, but why permit an irregular procedure which produces such complications? [9] (3) It may be assumed that the execution sale operates like a foreclosure sale, exhausting the mortgage lien whether the proceeds satisfy the debt or not. If we further assume that every one will understand that this is the legal effect of the sale, bidding will be on the same basis as in the case of normal foreclosure, and the only practical objection to the procedure will turn on "evasion" of sundry rules of foreclosure practice.[10] But the assumption that every one will understand the legal effect of the sale is violent indeed, since lawyers and judges are so far from agreement about it. As matter of fact, it must be supposed that some or all of the potential purchasers would misunderstand it. It cannot even be supposed that they would know that

[8] See Goring v. Shreve, 7 Dana (37 Ky.) 64 (1838); Carpenter v. Bowen, 42 Miss. 28 (1868); McNair v. O'Fallon, 8 Mo. 188 (1843); Camp v. Coxe, 1 D. & B. (18 N. C.) 52 (1834). In these cases, although it was assumed that the proceeds of sale would be credited on the mortgage, it was also assumed that bidding would be had on the basis of the value of the equity of redemption without credit for the amount realized by the sale. Of course, no third person would bid on this basis unless the value of the land exceeded the mortgage debt, or, to be more exact, unless he believed the value of the land to so far exceed the debt as to make such purchase advantageous. Since this is a relatively unusual situation, we have preferred to emphasize the results where the land is worth less (that is to say, is regarded as worth less) than the mortgage debt, in which case, as we have said, no one other than the mortgagee could bid anything for it, and this would be equally true whether the proceeds of the sale were to be applied on the mortgage lien or not.

[9] The merger theory would not be applicable in the off case where a third person purchased, but the equities would be the same and similar results might be expected. Subrogation and merger are sisters, though not identical twins.

[10] Atkins v. Sawyer, 1 Pick. (18 Mass.) 351, 11 Am. Dec. 188 (1823); McClure v. Mounce, 2 McCord (S. C.) 423 (1823); McNair v. O'Fallon, 8 Mo. 188 (1843).

the judgment was founded on the mortgage debt.[11] It follows that there would be more than the usual sacrifice of values. It may even be said that this third assumption brings up the most serious difficulties of all, precisely because it gives more to the purchaser, and therefore takes more from the mortgagor, without any assurance of a better price.[12]

This is an incomplete analysis of judicial thought upon our subject, but it is enough to demonstrate that this procedure creates confusion with respect to its legal effect, if any legal effect is to be given to it. Therefore, without going further in our analysis, we may say at once that there are impediments to a fair sale, because a sale "upon which a clear legal title is not passed to any bidder but the mortgagee himself, *must* be in every case a disadvantageous sale." [13] Since the question is whether the mortgagee shall be allowed this cumulative remedy, this alternative and quite unnecessary method of reaching the mortgaged land, it would seem clear that the answer should be no. In fact the answer has usually been no, in the full sense of holding that such a sale is void.[14] This result has been reached even in the face of a statute which in general terms declares that an equity of redemption shall be subject to execution.[15] The same result has not infrequently been dictated by an explicit statutory provision that an execution founded on a debt secured by mortgage shall not be levied on the equity of redemption.[16] In the absence of such legislation, a few courts have held that

[11] If the usual routine of an execution sale were followed, there would be nothing in the sheriff's statement of the terms of sale to apprise purchasers of the nature of the judgment, and we would consider it somewhat fantastic to expect the sheriff to depart from his usual routine, even if he knew the facts. Nor is it ordinarily considered necessary for a purchaser at execution sale to look beyond the record to ascertain the nature of the obligation on which the judgment is founded.

[12] The writers have not seen any case in which the matter was argued in just this way, but are not guilty of originality in any serious sense. They have merely developed in their own way the *leit motif* which runs through most of the opinions, viz., practical obstacles to a fair sale.

[13] Camp v. Coxe, 1 D. & B. (18 N. C.) 52 at 59 (1834).

[14] 3 JONES, MORTGAGES, 8th ed., sec. 1587 (1928).

[15] The construction of such a statute is argued at length in Camp v. Coxe, 1 D. & B. (18 N. C.) 52 (1834). A comparable statute was given the opposite construction in Cottingham v. Springer, 88 Ill. 90 (1878).

[16] See, for example, Mich. Comp. Laws (1929), sec. 14659: "When a judgment shall be recovered for a debt secured by mortgage of real estate, or for any part of such debt, it shall not be lawful for the sheriff or other officer to sell the equity of redemption. . . ." Gale v. Hammond, 45 Mich. 147, 7 N. W. 761 (1881); Preston v. Ryan, 45 Mich. 174, 7 N. W. 819 (1881). See also, Jones v. Perkins, 115 Kan. 759, 225 Pac. 97 (1924); Palmer v. Foote, 7 Paige (N. Y.) 437 (1839).

the only recourse of the mortgagor is by timely and appropriate proceedings to restrain the sale. In this latter view, the sale, if made, is valid. There is, however, difference of opinion as to its consequences. It may be held to have the same effect as a normal foreclosure sale, giving title free from the lien of the mortgage even though the proceeds do not satisfy the mortgage debt, or it may be held to give title subject to the lien of the mortgage for any deficiency.[17] For the purpose of the present inquiry, it makes little difference which of these views obtains, because it is almost inevitable that the mortgagee will himself be the purchaser.

Let us now summarize our conclusions. Suppose that a mortgagee decides to take judgment on the debt and levy upon the equity of redemption, and suppose that he is not stopped in midcourse by an injunction. We come then to sale and therewith to the question of the effect of the sale. We have seen enough of the confusion concerning such sales so that we can say at once that it is unlikely that any third person will make a bid which the mortgagee can afford to accept. Even in normal foreclosure, the mortgagee usually has to purchase himself, and the irregularity and uncertainty of the present procedure makes that result practically inevitable. What, then, is the fruit of the proceeding? Probably nothing, the sale being void. But let us suppose that the sale is valid, as some courts have held. The mortgagee, unlike third persons, does not need to concern himself with the question whether the title is subject to the lien of his mortgage for a deficiency. Nor need he consider discharge of the debt by merger: normally he will be satisfied to get title to the property, regarding the personal obligation of the mortgagor as unimportant. He is, however, concerned with something more than validity of the title: its marketability is matter of prime importance. Query, then, whether the procedure in question can produce a marketable title? Certainly not unless the court of last resort has previously passed upon the effect of such a sale. And even if there are prior decisions sustaining such sales, they would now be dubious authorities when the factor of "evasion" of the moratorium has been injected into the case. It seems clear, then, that no lawyer should advise such procedure.

[17] 3 JONES, MORTGAGES, 8th ed., sec. 1587 (1928). In Cottingham v. Springer, 88 Ill. 90 (1878), mortgagee was held to have complete title by his purchase, but the court declined to say what title would be acquired by a third person purchasing at such a sale. It was not observed that uncertainty on the latter point would make the sale oppressive.

II

DEFICIENCY JUDGMENT: LEVY ON STATUTORY RIGHT OF REDEMPTION

The procedure heretofore examined, personal action leaving the mortgage on the shelf, is one which, if it can escape the perils which surround it, sidesteps every form of moratory relief from foreclosure, whether it consists in suspension of decree or sale, or in appraisal or upset price, or in grant or extension of redemption from sale. We come now to consideration of a course of action which, if it is permitted, will circumvent the third form of debtor relief, viz., grant or extension of redemption from sale, but can have no effect upon the others because it presupposes a foreclosure which is complete in every respect except that the sale remains subject to redemption and is to that extent merely tentative. That is not to say that the question is unimporant. The commonest form of mortgage moratorium is that which operates through redemption from sale.

It might be said that even where the moratorium takes the redemption form, the mortgagee will not be interested in levy upon the right of redemption because that right has no market value. We may take this to be substantially true with respect to the case where the mortgagor or a third person has purchased at the foreclosure sale, but that case is purely hypothetical. Even where there is no right of redemption from foreclosure sale, the property is usually bought in by the mortgagee. And redemption statutes have the effect of making purchase by the mortgagee the almost invariable rule. They had that effect even in pre-depression days when the period of redemption was regarded as absolutely fixed by the terms of the statutes, because, on the one hand, they made it quite unnecessary for the mortgagor and his successors (those to whom the right of redemption was granted) to purchase for their own protection, and, on the other hand, they discouraged purchase by strangers, since an outstanding right of redemption precludes immediate use of the property in a normal way, and likewise renders purchase unattractive as a speculation, since it gives too large a slice of speculative opportunity to the redemptioners. Then, when emergency legislation appears on the scene, no one can reckon the term of life of the right of redemption. The statute may merely extend the right of redemption till a stated date, but every one immediately envisages a renewal of the legislation before it has expired.[18] In sum, it must be a

[18] For example, under the Michigan moratorium statute, Mich. Pub. Acts 1933,

freak case, a juridical five-legged calf, when any other than the mortgagee purchases at the foreclosure sale. Given, then, a purchase by the mortgagee, it is a vital question whether he must for the undefined period of the emergency hold title tentatively, or can make his title absolute by levying execution upon and himself purchasing the right of redemption.

It will be seen at once that this question is very different from that previously discussed, where, without any foreclosure being had, the mortgagee attempts to levy execution on the *equitable* right of redemption. Objections to that procedure, though they may be expressed in various ways and may lead to various conclusions, all turn on the fact that the procedure approximates normal foreclosure though with differences which make it an undesirable substitute for foreclosure. That cannot be said of levy on the statutory right to redeem from foreclosure sale because, by hypothesis, foreclosure has already taken place. But now the mortgagee meets new difficulties which turn on the policy embedded in the redemption statutes. What is that policy?

Two ideas are current with respect to the purpose of the redemption statutes. The more obvious idea is that their purpose is to give the mortgagor and his successors more time — a sort of perennial moratorium applicable in the fat years as well as the lean, or, it might be said, a statutory big brother of the days of grace of the old law merchant. The other idea is more difficult to express. It presupposes that "public sale" with "competitive bidding" are high-sounding phrases without much fact content. It recognizes the sad truth that ordinarily the mortgagee bids in the property with no serious competition, with the untoward consequence that the property goes for a fraction of its real value. From this point of view, the redemption statutes are related to the upset price. They are also related to the legislative attempts, known in several populist states, to obviate sacrifice sale on foreclosure and on general execution by requiring an appraisal of the property and forbidding sale for less than a stated fraction of the appraised value. The redemption statutes aim at the same evil, but use a different technique. They do not fix a minimum sale price. They leave the mortgagee legally free to buy on his own terms. But they make it dangerous for him to buy for less than the real value of the property, by providing that the mortgagor and his successors may subsequently

Act No. 98, sec. 2, the cause could be "continued" until March 1, 1935. Two days before the expiration of that time, the time was again changed to March 1, 1937. Mich. Pub. Acts 1935, Act No. 3.

take the property away from the purchaser at the bid price plus interest. As it has been well expressed, the mortgagor and such other persons as have the right of redemption are made "preferred bidders" who do not have to attend the sale but may come in at any time within the statutory period, and do not have to raise the previous bid but may take over the property at that price. This of course means that the mortgagee, though he may be the only person attending the sale, must consider himself in competition with all potential redemptioners and must bid the property up to the figure at which he is willing to part with it.

We need not for the present purpose determine which is *the* purpose, or which the *principal* purpose of the redemption statutes,[19] for it is plain that both purposes are defeated if we allow the mortgagee to levy execution on the right of redemption. If that were permitted, the redemptioners would not enjoy their year (or whatever the statutory period) of grace, and the pressure on the mortgagee to bid up the property to its true value would be weakened (more or less according to circumstances) if it were in his power to eliminate preferred bidders the next morning by levy on their right of redemption.

We do not find any mortgage cases dealing with this question,[20] but we find exactly parallel decisions with respect to redemption from ordinary execution sales. The creditor having levied and purchased for less than the amount of the judgment, it is held that a second levy cannot be made on the right to redeem from the first sale.[21] In *Peebles v. Pate*, the court said: "The only ground upon which such a proceeding [second levy] could be sustained would be where the defendant had subsequently acquired such new estate in the land as subjected it to execution, or had perpetrated a fraud which made the sale void."[22]

[19] The point is discussed by Durfee and Doddridge, "Redemption from Foreclosure Sale—The Uniform Mortgage Act," 23 MICH. L. REV. 825 at 838 (1925).

[20] The statutory right of redemption is usually regarded as alienable, but that is not to be taken for granted. Mixon v. Burleson, 203 Ala. 84, 82 So. 98 (1919); Smith v. Shaver, 112 Kan. 790, 212 Pac. 666 (1923); note, 29 L. R. A. (N. S.) 508 (1911).

[21] Hill v. Blackwelder, 113 Ill. 283 (1885); Hardin v. White, 63 Iowa 633, 16 N. W. 580, 19 N. W. 822 (1884); Peebles v. Pate, 90 N. C. 348 (1884). Sale of the right of redemption under another judgment is, of course, another story. Hardin v. White, 63 Iowa 633, 16 N. W. 580, 19 N. W. 822 (1884); Lynch v. Burt, (C. C. A. 8th, 1904) 132 Fed. 417; Hammond v. Horton, 137 Mo. 151, 37 S. W. 825 (1896); Russell v. Fabyan, 34 N. H. 218 (1856). But even this is not universally admitted. Hamilton v. Hamilton, 51 Mont. 509, 154 Pac. 717 (1916). Compare Sayre v. Vander Voort, 200 Iowa 990, 205 N. W. 760 (1925).

[22] 90 N. C. 348 at 353 (1884).

The absence of mortgage cases is easily explained. With redemption statutes in force, it has been the usual practice for the mortgagee to bid the amount of the debt and costs, because the value of the property has usually (until the great depression) been somewhere near that sum. Hence, deficiency judgment has been relatively rare.[23] The spread between value and debt is likely to be much greater in the case of levy of general execution, and so there is more likely to be a deficiency and therewith the attempt to make a second levy. In all other respects the cases are parallel, and the decisions on execution sale are opposite authorities against levy on the right to redeem from foreclosure sale.

III

DEFICIENCY JUDGMENT: LEVY AFTER REDEMPTION FROM SALE

Where redemption occurs, a foreclosure proceeding is fully completed, and moratory statutes would, of course, have no effect thereafter. This does not mean, however, that any procedure after redemption can be overlooked in considering moratory legislation, especially if such procedure may have the possible effect of destroying any good that may have been accomplished by such legislation. In other words, may it not be said that moratory legislation is incomplete if it is possible, by levy under deficiency judgment after redemption from sale, for the mortgagee to acquire the benefit of the redemption which has been so carefully preserved to the mortgagor under moratory legislation?

Redemption after sale is governed both by explicit statutory provision and by judicial construction of statutes, and the effect of redemption may be, and often is, provokingly complicated by the rights of junior lienors.[24] For the purpose of this discussion, however, where those primarily concerned are the mortgagor and mortgagee, redemp-

[23] In Barnitz v. Beverly, 163 U. S. 118 at 130, 16 Sup. Ct. 1042 (1896), holding unconstitutional a retroactive redemption statute, Mr. Justice Shiras said that "this scheme of foreclosure renders it necessary for the mortgagee to himself bid, or procure others to bid, the entire amount of the mortgage debt." It might, of course, be otherwise in the odd case where the mortgagor is clearly collectible, and in some communities where mortgagee can have a receiver take possession during the period of redemption and apply the rents and profits on a deficiency judgment, it is not uncommon for mortgagee to shade his bid by the amount which he reckons can be realized by the receiver.

[24] Durfee and Doddridge, "Redemption from Foreclosure Sale—The Uniform Mortgage Act," 23 MICH. L. REV. 825 (1925).

tion may be considered as "annulling the sale," in the sense that the owner-redemptioner recovers, or preserves, his old estate, freed from the mortgage lien, and any statutes prohibiting levy by the mortgagee on the "equity of redemption" or "right of redemption" have no effect after actual redemption by the mortgagor or his successor.[25]

Of the "policy factors" discussed above as prevailing before redemption, do any of them apply *after* redemption, and if so, to what extent? The principal factor applying before sale, that is, that on the execution sale the mortgagee is in a preferred position, would not seem to apply after redemption; on an execution sale based on the deficiency decree after redemption, the former mortgagee would seem to be in no more favored position than either the former mortgagor or a third party. As to the objection that such levy would permit a type of foreclosure not contemplated in the foreclosure statutes, the answer would seem to be that once the statutory foreclosure is completed (as it necessarily is on redemption), there could be no objection on that score. Certainly there can be no purpose in saying that the mortgagor's right to redeem must be preserved to him, once that right has been exercised. The only remaining factor that would seem to carry over after redemption is the purpose of the redemption statute — what would be the effect on the mortgagee's bid at foreclosure sale of the giving, or the withholding, of a right to levy execution on the land should the mortgagor redeem?

Bearing in mind that a deficiency decree or judgment is no more or no less than a money judgment for the amount due on the mortgage debt, after deducting the net amount realized from the foreclosure sale, together with the fact that after redemption the mortgagor and mortgagee stand in a relation to each other no different from that of any debtor and his unsecured creditor, it is submitted there is no logical reason why such levy should be denied to the mortgagee, and the effect on his bidding at the foreclosure sale is, as a practical matter, so remote as to be entirely negligible.

The question of whether such levy is possible is categorically answered in the affirmative by one authority,[26] citing as the only authority

[25] Mitchell v. Ringle, 151 Ind. 16, 50 N. E. 30, 68 Am. St. Rep. 212 (1898), holding that Burns Rev. Stat. (1894), sec. 1119, prohibiting the sale of a mortgagor's equity of redemption to satisfy the mortgage, does not preclude a "resale" to satisfy a deficiency after redemption by the mortgagor from the first sale.

[26] 3 JONES, MORTGAGES, 8th ed., sec. 1588 (1928): "After a redemption from a mortgage sale, a judgment for the deficiency may be levied upon the same property, although the debtor has other property subject to execution."

a case based entirely upon what seems to be a law peculiar to Indiana,[27] and this case is probably the reason why some of the courts speak of such a levy after redemption in terms of "the mortgage lien reattaching," rather than in terms of "process to enforce money judgment or decree."

The major distinction between levying execution after redemption, and such levy before redemption as discussed in the first two subdivisions above, lies in the difference in the character of the mortgagor's interest in the two situations. The cases seem quite clearly to hold that the redemption by the mortgagor of land sold under foreclosure is an acquisition of "such a new estate in the land as subjects it to execution" by the mortgagee.[28] A distinction is noted between redemption by a party primarily liable on the mortgage debt, and redemption by one not liable upon the mortgage debt,[29] this distinction explaining the apparent discrepancy in two Iowa cases.[30]

As far as the economic factors of the situation are concerned, it is true that the mortgagee is generally the only bidder at the foreclosure or execution sale, is in the "controlling position" referred to since the earliest equity cases, and may bid the property in at what may appear to be an unfair price in many cases. In following such a course he of course runs the risk of redemption, and the practical difficulty in satisfying a deficiency execution, combined with the possibility of redemp-

[27] Cauthorn v. Indianapolis and Vincennes R. R., 58 Ind. 14 (1877), with which compare Todd v. Oglebay, 158 Ind. 595, 64 N. E. 32 (1902).

[28] Peebles v. Pate, 90 N. C. 348 (1884).

[29] Ogle v. Koerner, 140 Ill. 170 at 179-180, 29 N. E. 563 (1892):

> "When the redemption is made by a party primarily liable on the mortgage debt, it may be that the same property may be resorted to again for the purpose of subjecting it to the payment of an unpaid balance due on the mortgage, but that is not because of any right to enforce the mortgage lien against the same property a second time, but because of the rule of law which subjects all of the property of the debtor to the payment of his debts until they are satisfied in full. But where the redemption is made by a party not liable upon the mortgage debt, the mortgage lien having been exhausted, the property can not be subjected a second time to the satisfaction of the same lien. The party redeeming does so for his own benefit, and the holders of the senior mortgage having, by the sale, become entire strangers to the property, are in no position to derive any advantage from the redemption."

See also Easter v. Holcomb, 221 Ill. App. 485 (1921), and Willis v. Miller, 23 Ore. 352, 31 Pac. 827 (1893).

[30] Clayton v. Ellis, 50 Iowa 590 (1879); Crosby v. Elkader Lodge, 16 Iowa 399 (1864). See also Fields v. Danenhower, 65 Ark. 392, 46 S. W. 938, 43 L. R. A. 519 (1898), and Dupee v. Salt Lake Valley Loan & Trust Co., 20 Utah 103, 57 Pac. 845, 77 Am. St. Rep. 902 (1899).

tion both from the mortgage sale and the execution sale,[31] operate as a strong deterrent from making insufficient bids; the mortgagee is still between Scylla and Charybdis in fixing the amount of his bid. In spite of this, however, if the mortgagor has assets sufficient to redeem, the mortgagee is entitled to reach these for the payment of his debt in full if a fair price has been bid at the sale, and the principles which protect a mortgagor's equity of redemption and statutory right of redemption against levy by the mortgagee would not seem to include giving him a shield behind which he could hide assets otherwise belonging to the mortgagee. It is possible, of course, that to escape such consequences the mortgagor might redeem in the name of some other party, to whom he had assigned his right to redeem; as to the right of a mortgagee to pierce the veil of such an assignment, if it were colorable or in fraud of the mortgagor's creditors, query.

This brief résumé of the parties' rights after redemption, while at first blush beside the point as regards moratory legislation, does indicate one respect in which moratory legislation may be incomplete. Legislatures may think that if a mortgagor can raise sufficient money to redeem his property from foreclosure sale, he is of sufficient affluence to look out for himself thereafter without the further tender care of the legislature. If, however, the redeemed property may be levied upon by the mortgagee under deficiency execution, moratory legislation must be aimed at the deficiency decree as well as merely preserving or extending the right of redemption.

Since the foregoing analysis moves in one direction, a formal statement of conclusions is unnecessary. It may, however, be in order to revert to the question which was first touched upon and laid aside, viz., the question whether prosecution of these personal remedies would constitute an evasion of the moratory statutes in the sense of violating their spirit. The writers did not feel competent to answer that question, but it does not take great acumen to see that the mere injection of this question into the problems which we have examined is itself significant. Until the advent of this legislation, the mortgagee had

[31] Many statutes, of course, provide for a period of redemption following an execution sale, and it would thus appear that even if execution is allowed to be levied upon the mortgagor's interest (whether his equity of redemption, statutory right of redemption, or interest in the land after redemption), he is not irrevocably cut off, although, as pointed out in some of the decisions, such procedure does add extra cost and burdens. If the statutes do not provide for redemption from such execution sale, there would be present a strong policy factor against permitting such levy.

in some states a chance, though no more than a chance, of substituting personal action, followed by execution or other process affecting the mortgaged land, for foreclosure. Surely that chance is now reduced to infinitesimal proportions. The point is particularly clear in view of the fact, before adverted to, that the ultimate success of the procedure almost inevitably depends upon marketability of title. It therefore seems to the writers that unless and until some hardy mortgagee carries such procedure to successful conclusion in a court of last resort, it would be altogether unwise to advise this course of action.