

THE STATUTORY RIGHT OF REDEMPTION IN CALIFORNIA

The ever-increasing volume of loans secured by real property in California, as well as in other states,¹ emphasizes the importance of the remedies available to the creditor and the rights of the debtor in the event of default. In California the law allows a judicial foreclosure² when a default in mortgage payments occurs.³ If a deed of trust or a mortgage with a power of sale is employed, judicial foreclosure remains available⁴ as an alternative to a sale under the power.⁵

¹ An idea of the growth in mortgage lending can be gained from the following figures. Mortgage loans held by commercial banks in the United States in 1956 totaled \$22.7 billion; in 1958, \$25.5 billion; in 1960, \$28.8 billion; in 1962, \$34.5 billion. Mortgage loans made by savings and loan associations in the United States in 1956 totaled \$10.3 billion; in 1958, \$12.2 billion; in 1960, \$14.3 billion; in 1962, \$20.75 billion; in 1963, \$24.7 billion. Mortgage loans outstanding held by savings and loan associations grew from \$35.7 billion in 1956 to over \$90.8 billion in 1963. 50 FED. RESERVE BULL. 373-74 (1964). In California mortgage loans made by insured savings and loan associations totaled in 1956 \$1.57 billion; in 1958, \$2.0 billion; in 1960, \$2.95 billion; in 1962, \$5.59 billion. CAL. SAVINGS & LOAN LEAGUE, 1963 DATA BOOK 19 (1963).

² For a brief history of judicial foreclosure in England and in the United States see OSBORNE, MORTGAGES 918-23 (1951) [hereinafter cited as OSBORNE].

³ CAL. CODE CIV. PROC. § 726.

⁴ CAL. CODE CIV. PROC. § 725a.

⁵ CAL. CIV. CODE § 2924. The increased use of security devices containing a power of sale in California, and the resulting utilization of the sale under the power, often causes lenders to overlook the judicial foreclosure. See, e.g., CAL. C.E.B., CALIFORNIA LAND SECURITY AND DEVELOPMENT 285 (1960). In many ways judicial foreclosure does have disadvantages when compared with the less formal sale under the power of sale which is set forth in CAL. CIV. CODE §§ 2924-24b. The delay and cost accompanying formal court proceedings often is discouraging to the creditor seeking to settle the matter, recoup what he can, and move on to other business. See Bridewell, *The Effects of Defective Mortgage Laws on Home Financing*, 5 LAW & CONTEMP. PROB. 545 (1938). The judicial foreclosure and sale does provide an advantage, however. When the property is subject to many claims, the title clouded, or the relationships of persons claiming interests in the property unclear, the judicial determination of the rights of all persons made parties to the foreclosure action is a great benefit. See generally OSBORNE 922-23. The most common motive for utilizing the judicial foreclosure is that it is a prerequisite to obtaining a deficiency judgment against the debtor; a sale under the power of sale precludes a deficiency judgment regardless of the type of loan. See CAL. CODE CIV. PROC. §§ 580a-580d; Hetland, *Deficiency Judgment Limitations in California—A New Judicial Approach*, 51 CALIF. L. REV. 1 (1963); Riesenfeld, *California Legislation Curbing Deficiency Judgments*, 48 CALIF. L. REV. 705 (1960).

Recently the California Supreme Court opened a vast new area in which judicial foreclosure may be the only remedy available to lenders. In *Coast Bank v. Minderhout*, 61 A.C. 307, 392 P.2d 265, 38 Cal. Rptr. 505 (1964), Justice Traynor, speaking for a unanimous court, found that an agreement not to encumber or transfer property until loans from the creditor to the debtor were paid constituted an equitable mortgage. Since no provision for a power of sale was included in the agreement, the creditor was restricted to judicial foreclosure as his exclusive remedy. See CAL. CODE CIV. PROC. § 726. Since this type of agreement has been in wide use throughout California, especially by lending institutions, an increase in the number of judicial foreclosures should result. In *Minderhout*

When foreclosure is obtained by judicial proceedings, the California statutes⁶ provide for a period after the foreclosure sale within which the mortgagor or his successor in interest, known generically as redeemers, can redeem the property from the foreclosure sale and thereby regain the estate.⁷ Creditors with junior liens on the property, who are known as redemptioners,⁸ are also allowed to redeem.⁹

This Comment will examine the statutory right of redemption in California and will anticipate and suggest solutions to problems which may arise under present law. The Comment will begin by examining the general operation of redemption and then will seek to determine who is entitled to redeem, how much must be paid by one who wishes to redeem, to whom the redemption money may be paid, and, finally, the status of the various parties following a redemption.

As used in this Comment, the word "redemption" refers to the statutory right of redemption unless otherwise specified.¹⁰ This statutory right of redemption must be distinguished from the equity of redemption—the right to pay off the senior lien before the foreclosure action.¹¹ Judicial foreclosure terminates the equity of redemption and gives rise to the statutory right of redemption.¹² The word "debtor" will include the

the plaintiff pleaded and the defendant admitted by failing to answer following a demurrer that the parties intended to create a security interest in the property. All that the court had to decide was whether the instrument could be reasonably susceptible to such an interpretation. If the defendant had denied that a security interest in the property held by him at the time of the agreement was intended, evidence could have been presented to be used in the interpretation of the instrument.

Increased use of the judicial foreclosure in order to obtain deficiency judgments is likely in periods of economic decline since creditors, faced with the likelihood of not being able to realize a sufficient return on the sale of the security, will seek deficiency judgments against debtors in preference to relying exclusively on the property for repayment.

⁶The provisions which this Comment will discuss are for the most part contained in CAL. CODE CIV. PROC. §§ 700-08. While these code sections expressly cover redemption from any execution sale which is subject to redemption, they apply with equal effect to redemption from mortgage foreclosure sales. CAL. CODE CIV. PROC. §§ 700a, 725a. *Stout v. Macy*, 22 Cal. 647 (1863).

⁷CAL. CODE CIV. PROC. §§ 701, 703.

⁸CAL. CODE CIV. PROC. § 701 defines a redemptioner as "A creditor having a lien by judgment or mortgage on the property sold, or on some share or part thereof, subsequent to that on which the property was sold."

⁹CAL. CODE CIV. PROC. § 701.

¹⁰See generally OSBORNE 23. The word "mortgage" as used herein will also include deeds of trust and mortgages with powers of sale when they are foreclosed by judicial action, except where a distinction is specifically drawn.

¹¹See CAL. CIV. CODE §§ 2903-05.

¹²The right of redemption after foreclosure sale is a creature of statute, and it has often been stated that strict compliance with the statutory procedures is necessary for there to be a valid redemption. *Bangham v. Michael*, 179 Cal. 390, 177 Pac. 161 (1918) (commissioner's noncomplying acts void); *Hibernia Sav. & Loan Soc. v. Behnke*, 121 Cal. 339, 53 Pac. 812 (1898) (strict compliance needed to divest purchaser); *Wilcoxson*

mortgagor, trustor under a deed of trust, and judgment debtor; "creditor" will include mortgagee, beneficiary under a deed of trust, lender, and judgment creditor; "sale" will mean judicial sale following a foreclosure by action unless otherwise indicated.

The statutory right of redemption has been both praised and condemned by commentators.¹³ It is argued that by allowing redemption from a foreclosure sale the law encourages mortgagors to be less responsible in meeting their installment payments; they know that even if they default they may later regain their property by redeeming it from the purchaser at the sale. A more important objection is that the availability of redemption means that the purchaser at the foreclosure sale gets a defeasible title. This probably discourages outside bidding at the sale since the conditional title is not attractive to investors.¹⁴ Moreover, a period of redemption allows speculation by those entitled to redeem; they may choose to exercise their right to redeem only if the value of the property rises. It is also argued that allowing the mortgagor to remain in possession during the period of redemption permits him to "milk" the property before surrendering it to the purchaser.¹⁵ On the other side it is argued that the reasons for allowing redemption outweigh the possible abuses. Such purposes include protecting persons who purchased the property subject to the mortgage, allowing time for the mortgagor to refinance and save his property, permitting additional use of the property by a hard-pressed mortgagor, and probably most important, encouraging those who do bid at the sale to bid in at a fair price.¹⁶ By allowing junior lienors to redeem, the statutes permit them to protect the security which they probably would otherwise lose.¹⁷

v. Miller, 49 Cal. 193 (1874) (transcript of judgment not sufficient); Gross v. Fowler, 21 Cal. 392 (1863) (premature sheriff's deed void). In *Haskell v. Manlove*, 14 Cal. 54 (1859), it was held that a copy of a judgment was not sufficient compliance since only a docketed judgment by which a lien was created was sufficient to make the judgment creditor a creditor having a lien for redemption purposes.

When the equities of the individual case so dictate, however, the courts will allow otherwise defective acts to suffice as a redemption. *Webb v. Vercoe*, 201 Cal. 754, 258 Pac. 1099 (1927) (agreement to extend period binding); *Benson v. Bunting*, 127 Cal. 532, 59 Pac. 991 (1900) (estoppel to enforce time limits); *Kofoed v. Gordon*, 122 Cal. 314, 54 Pac. 1115 (1898) (innocent mistake grounds for relief if good faith attempt to redeem); *Omnibus Inv. Corp. v. Maag*, 188 Cal. App. 2d 29, 10 Cal. Rptr. 178 (1961) (equity may extend period) (dicta).

¹³ For a comprehensive history of the right to redeem following a foreclosure sale, see Durfee & Doddridge, *Redemption From Foreclosure Sale—The Uniform Mortgage Act*, 23 MICH. L. REV. 825 (1925).

¹⁴ See OSBORNE 24-26.

¹⁵ See note 128 *infra* and accompanying text.

¹⁶ See *Christensen v. Forst*, 153 Cal. App. 2d 465, 314 P.2d 746 (1957); Durfee & Doddridge, *supra* note 13, at 838-41.

¹⁷ *Bank of America v. Hill*, 9 Cal. 2d 495, 71 P.2d 258 (1937). For the effect of foreclosure actions on persons interested in the property, see OSBORNE 901-72.

I

THE GENERAL OPERATION OF REDEMPTION

The older view in California was that the purchaser at a judicial sale received equitable title, while the legal title remained in the mortgagor during the period of redemption.¹⁸ The sheriff's deed, which was received after the period of redemption had run, conveyed the legal title.¹⁹ In the early 1900's the California Supreme Court announced the modern view,²⁰ deciding that the purchaser acquires the legal title at the sale, but that this title, as evidenced by the certificate of sale,²¹ is subject to a condition subsequent—that there will be a valid redemption. The occurrence of the condition will divest the purchaser of his estate. Equitable title is also in the purchaser under the modern view;²² the sheriff's deed adds nothing, other than to indicate that the period of redemption has run.²³ Although the purchaser has title, the mortgagor has the right to redeem and the right to the use and occupancy of the land during the period of redemption.²⁴

The system of redemption in California is known as "scramble" redemption.²⁵ A twelve-month period is allowed for redemption by the

¹⁸ *Foorman v. Wallace*, 75 Cal. 552, 17 Pac. 680 (1888); *Abadie v. Lobero*, 36 Cal. 390 (1868); *People v. Mayhew*, 26 Cal. 655 (1864) (purchaser only gets a lien) (dicta); *McMillan v. Richards*, 9 Cal. 365 (1858).

¹⁹ *Page v. Rogers*, 31 Cal. 293 (1866); *Cummings v. Coe*, 10 Cal. 529 (1858).

²⁰ *Pollard v. Harlow*, 138 Cal. 390, 71 Pac. 454 (1903); *Youd v. German Sav. & Loan Soc.*, 3 Cal. App. 706, 86 Pac. 991 (1906).

²¹ The certificate of sale is given to the purchaser at the sale by the officer conducting the sale. The contents of the certificate are prescribed in CAL. CODE CIV. PROC. § 700a.

²² *Leaver v. Smith*, 47 Cal. App. 474, 190 Pac. 1050 (1920).

²³ *Allen v. McGee*, 54 Cal. App. 2d 476, 129 P.2d 143 (1942).

²⁴ CAL. CODE CIV. PROC. § 706. *First Nat'l Trust & Sav. Bank of San Diego v. Staley*, 219 Cal. 225, 25 P.2d 982 (1933); *Pollard v. Harlow*, 138 Cal. 390, 71 Pac. 454 (1903). This facet of the redemption process is discussed in detail in the text accompanying notes 113-28 *infra*.

²⁵ The redemption systems used by other states are often interesting and complex. The "order" system provides for a period within which only the mortgagor or his successor in interest can redeem, followed by a period within which creditors can redeem, followed by a period within which the mortgagor or successor in interest again has the sole right to redeem. *E.g.*, IOWA CODE ANN. §§ 628.3-628.15 (1950). In some states a strict priority system is employed when creditors are allowed to redeem. That is, the senior may have five days after the right to redeem accrues, followed by five days for the next senior lienor, etc., until all lienors have five days in which to redeem. *E.g.*, ARIZ. REV. STATS. § 12-1282B (Supp. 1963); MINN. STATS. ANN. § 550.25 (1947). If the hypothetical situation in the text accompanying note 39 *infra* were to occur in another jurisdiction, the judgment debtor or his successor in interest may have the first six months to redeem, if no redemption occurred, the creditors in order of priority, with five days for each, may redeem, and then the judgment debtor or the successor in interest would have the final three months of the period within which to redeem. The amounts which each must pay may also vary. In many states junior creditors and the subsequently redeeming judgment debtor or successor in interest may only have to pay senior liens of a prior

mortgagor, his successor in interest, or by a junior lienor.²⁶ Those entitled to redeem may redeem not only from the purchaser, but also from each other, and they may do so in any order. The scramble system, however, protects creditors in the order of their priority by requiring the mortgagor and the lienors junior to a prior redemptioner to pay the amount of any senior liens held by the prior redemptioner in addition to the other amounts due.²⁷ Once the mortgagor or his successor in interest redeems, no further redemptions are possible—the effect of the sale is terminated. The mortgagor, or his successor in interest, is returned to his estate, and the unsatisfied junior liens reattach to the property.²⁸

A redemption is made by paying the requisite amounts²⁹ to the purchaser, or the last redemptioner of record, or for him to the officer who made the sale.³⁰ Upon the redemption, the redeeming party³¹ is entitled to a certificate of redemption.³² The recording of this certificate of redemption, or the certificate of sale in the case of the purchaser, entitles the redemptioner, or purchaser, to protection as a bona fide purchaser against any prior unrecorded conveyances.³³ A written notice of redemption must be recorded and a copy given to the sheriff when a redemption is made.³⁴ If the redemptioner pays any taxes, assessments, fire insurance, maintenance, or prior obligations secured by the property, a similar notice should be recorded.³⁵ Also, if the redemptioner has or acquires any liens, other than that upon which the property was sold, a notice of the

redemptioner if that redemptioner files a notice of the amount which he chooses to credit against his liens. See, e.g., IOWA CODE ANN. § 628.13 (1950); N.D. CENTURY CODE § 28-24-03 (1960).

²⁶ The twelve-month period applies when a mortgage without a power of sale is involved, CAL. CODE CIV. PROC. § 702, and where a deed of trust or a mortgage with a power of sale is foreclosed by action and the property is sold for a sum less than the judgment sum plus costs and expenses, CAL. CODE CIV. PROC. § 725a. Where the action is brought under a deed of trust or a mortgage with a power of sale and the property is sold for an amount equal to or greater than the judgment sum plus costs and expenses, the period of redemption is only three months in duration, CAL. CODE CIV. PROC. § 725a.

²⁷ CAL. CODE CIV. PROC. § 703, *Salsbery v. Ritter*, 48 Cal. 2d 1, 306 P.2d 897 (1957).

²⁸ CAL. CODE CIV. PROC. § 703, *Kaiser v. Mansfield*, 160 Cal. App. 2d 620, 325 P.2d 865 (1958).

²⁹ See notes 100-34 *infra* and accompanying text.

³⁰ CAL. CODE CIV. PROC. § 704.

³¹ CAL. CODE CIV. PROC. § 703(6) only mentions the redeeming debtor, but it also applies to a redeeming redemptioner.

³² The issuance of the certificate is not necessary for there to be a valid redemption, and a refusal by the sheriff to give the certificate will not affect an otherwise complete redemption. *Phillips v. Hagart*, 113 Cal. 552, 45 Pac. 843 (1896).

³³ *Riley v. Martinelli*, 97 Cal. 575, 32 Pac. 579 (1893); *Foorman v. Wallace*, 75 Cal. 552, 17 Pac. 680 (1888). See also comments relative to *Manig v. Bachman*, 127 Cal. App. 2d 216, 273 P.2d 596 (1954), in *Riesenfeld, Creditors' Rights*, 6 SURVEY OF CAL. LAW 148, 151 (1955).

³⁴ CAL. CODE CIV. PROC. § 703.

³⁵ *Ibid.*

same type must be recorded.³⁶ Should the redemptioner fail to record such notices, it is expressly provided that the property may be redeemed without paying such tax, assessment, sum, or lien.³⁷ Actual notice of such payments or liens will not cure the failure to record.³⁸ If the judgment debtor redeems, he need only record the certificate of redemption.

An illustration of the California scramble system may be valuable at this point. Suppose *A*, *B*, *C*, and *D* are lienors on certain property with *A* being the senior mortgagee, *B* the second in priority, *C* third, and *D* fourth. At *A*'s foreclosure sale following an action to which *B*, *C*, and *D* were parties, *A* bids in for the full amount of his lien and thereby becomes the purchaser of the property. After the sale *C* redeems from *A* by paying the amount *A* paid plus expenses, taxes, and other amounts allowed by statute. *A*'s lien was extinguished by the foreclosure sale so he cannot re-redeem from *C*, but *B* still has an unsatisfied lien and can redeem. If *B* redeems he must pay the purchase price, expenses, and any liens held by *C* which are senior to *B*'s lien. Assuming no expenses have been paid by *C*, *B* need only pay what *C* paid plus interest since *C*'s lien is junior to the lien under which *B* seeks to redeem. Since *C*'s lien is still unsatisfied, he may now re-redeem from *B* by paying what *B* paid, interest, expenses, and the amount of *B*'s lien, since *B*'s lien is senior to the lien of *C*. Should the mortgagor now desire to redeem from *C*, he must pay the amount which *C* paid (the purchase price plus the amount of *B*'s lien which *C* now owns), expenses, and also the amount of *C*'s lien. Since *D* cannot now redeem because the effect of the sale has been terminated by the mortgagor's redemption, the statute provides that *D*'s still unsatisfied lien will reattach to the property. The mortgagor now holds the property subject only to *D*'s lien.³⁹

³⁶ *Ibid.*

³⁷ *Ibid.* If no subsequent redemption is attempted, the failure to record would have no effect. See *Salsbery v. Ritter*, 48 Cal. 2d 1, 13-14, 306 P.2d 897, 904 (1957): "When a person eligible to redeem, without notice of any intervening redemption, tenders to the sheriff or the last redemptioner of record a sum of money, which but for the lien of the undisclosed redemptioner would be sufficient to effect a redemption, that tender is sufficient unless the person seeking to redeem is notified of the pertinent facts by the sheriff or the last redemptioner of record, and the intervening redemptioner who has failed to record is precluded from demanding as a prerequisite to redemption from him the amount of his lien."

³⁸ That actual notice does not cure the failure to record does not appear just. The purpose of recording is to inform subsequent redemptioners of the price which they must be prepared to pay. *Salsbery v. Ritter*, *supra* note 37. If a person seeking to redeem has actual notice of the amounts which would be required, no further notice should be necessary.

³⁹ See *Salsbery v. Ritter*, 48 Cal. 2d 1, 306 P.2d 897 (1957). CAL. CODE CIV. PROC. § 703 states that a subsequent redemptioner must pay "the sum paid on such last redemption." Therefore, in the example in the text accompanying this footnote, if *C* redeems from *A* and then *D* redeems from *C*, having to pay the amount of *C*'s lien, it is probable that if *B* then seeks to redeem he must pay as part of his redemption price the amount of *C*'s lien, since it was a part of what *D* had to pay, even though *C*'s lien is junior to *B*'s lien. The section also states, however, that a subsequent redemptioner must pay the amount of any liens

The preceeding discussion must be qualified in one respect: when a junior lienor redeems from the purchaser, subsequent redemptioners have only sixty days after the redemption in which to redeem.⁴⁰ If they do not redeem within sixty days after the last redemption by a redemptioner they lose their liens for redemption purposes.⁴¹ It is possible that a redemptioner will redeem when there are less than sixty days remaining in the twelve month redemption period. This raises the question of whether the sixty day limit on redemption from a redemptioner extends the twelve month period, and, if so, whether the mortgagor can avail himself of the extension. This question is as yet unanswered in California.⁴² The statute states that following a redemption by a redemptioner, "whenever 60 days have elapsed and no other redemption has been made . . . and the time for redemption has expired, the last redemptioner . . . is entitled to a sheriff's deed . . ." It can be argued that the italicized language indicates that the legislature contemplated that the sixty day period may run *after* the twelve-month period has expired. This interpretation would allow a new sixty day period to commence whenever another qualified redemptioner redeems, even if the original twelve-month period has long since passed.

held by such redemptioner prior to his own, and since *D* can be said to be subrogated to the lien which he paid, *B* can argue that he should not have to pay that amount since it represents a lien junior to his own.

The law as it stands would alter the priority of the liens, and even allow a person with more than one junior lien to redeem under the more senior of his liens and then redeem from himself under his other lien. This would force the more senior lienors to pay the amount of the satisfied lien even though it was junior to their liens. The more junior lienor is thus given greater protection than that afforded by allowing him to redeem in his original priority. It is true that California law features "race" statutes in recording matters, e.g., CAL. CIV. CODE § 1214, and perhaps it was the desire of the legislature to carry this concept over into redemption matters.

Since the value of the land may be less than sufficient to cover all of the liens including his own, the junior lienor faces the prospect of having to pay an amount greater than the value of the land if he wishes to redeem. This predicament does not necessarily call for sympathy, however, since that is a hazard of being a junior lienor. The value of the land and its future prospects should be considered *before* the junior seeks to redeem, and not after.

⁴⁰ CAL. CODE CIV. PROC. § 703.

⁴¹ See *Kaiser v. Mansfield*, 160 Cal. App. 2d 620, 325 P.2d 865 (1958).

⁴² Some states have dealt with the problem by specific provisions in their redemption statutes. E.g., IDAHO CODE § 11-403 (1948): "The property may be again, and as often as a redemptioner is so disposed, redeemed from any previous redemptioner, within sixty days after the last redemption *and within one year after the sale . . .*" (Emphasis added.); N.D. CENTURY CODE § 28-24-04 (1960): "If property is redeemed by a redemptioner, another redemptioner, even after the expiration of one year from the day of sale, may redeem from the last redemption if the redemption is made within 60 days after such last redemption."

The states which employ order redemption are not faced with this problem since redemptions must be within the given period. See e.g., ARIZ. REV. STATS. § 12-1282B (Supp. 1963); IOWA CODE ANN. §§ 628.3, 628.5, 628.15 (1950); MINN. STATS. ANN. § 550.25 (1947).

The result of allowing extension of the redemption period gives creditors greater privileges than are afforded to the mortgagor, since creditors may have longer than the specified twelve months in which to redeem.⁴³ The policy of the law should be to give the mortgagor at least as much opportunity to recapture his land as is given to a creditor.⁴⁴ Therefore, should the extension theory prevail, the mortgagor should be allowed to redeem during any extended period.⁴⁵

The extension theory is objectionable since it tends to keep the title unsettled for an indefinite period of time.⁴⁶ It would seem more in keeping with an efficient redemption system to limit *all* redemptions to the twelve months following the sale. Persons interested in the property would then be able to determine when the title would be settled, how much time they would have to raise the redemption money, and when they could expect a deed if they did redeem.⁴⁷

II

WHO CAN REDEEM

Section 701 of the California Code of Civil Procedure states

Property sold subject to redemption . . . or any part sold separately, may be redeemed . . . by the following persons, or their successors in interest:

⁴³ See note 26 *supra*.

⁴⁴ This policy is evidenced by the Code Amendment of 1873-74, c. 383, p. 323, § 97, which gave the judgment debtor the entire twelve-month period of redemption within which to redeem. Before this amendment no redemption could be made by anyone after sixty days had elapsed following a redemption by a redemptioner. *Boyle v. Dalton*, 44 Cal. 332 (1872). See Riesenfeld, *Creditors' Rights*, 6 SURVEY OF CAL. LAW 148, 149 (1955).

⁴⁵ Since the statute expressly provides for an extension only if a redemptioner redeems, it may require a statutory amendment to allow the mortgagor to redeem during the extended period. However, the statute also provides that the mortgagor must pay the same amounts as a redemptioner must pay. It can therefore be argued that the tenor of the statute is to treat the mortgagor the same as a redemptioner for purposes of that provision, and under the present statutory language, therefore, any extension should also apply to the mortgagor.

South Dakota provides for a sixty-day period which extends the period of redemption for junior creditors, S.D. CODE § 37.5612(2) (Supp. 1960), but further provides that the owner has fifteen days after the final redemption within which he has the final right of redemption. S.D. CODE § 37.5612(3) (Supp. 1960).

⁴⁶ The extensions are potentially great in number; the possibility of an extension remains as long as there is a creditor who has not redeemed and the sixty-day period which began with the last redemption has not expired. For example, should there be ten creditors each of whom redeems on the fifty-ninth day following a prior redemption, the title could be kept open for 591 days in addition to the number of days which preceded the first redemption by a redemptioner.

⁴⁷ If the sale is made by the sheriff, the redemption can be made by paying him the redemption money for the purchaser or redemptioner. CAL. CODE CIV. PROC. § 704. It is up to the sheriff to determine whether the person seeking to redeem is qualified when the redemption is made from the sheriff.

1. The judgment debtor, or his successor in interest, in the whole or any part of the property;
2. A creditor having a lien by judgment or mortgage on the property sold, or on some share or part thereof, subsequent to that on which the property was sold.⁴⁸

A. Redeemers

While there will be little doubt as to who is the judgment debtor, questions do arise as to who is a successor in interest.⁴⁹ It is now clear that the recipient of a deed from the mortgagor is a successor in interest for redemption purposes regardless of whether the deed was received before or after the mortgage was foreclosed and the property sold.⁵⁰ The deed transfers the grantor's interest in the property at the time of the deed.

Although the judgment debtor conveys his reversionary interest in the property, the statute still allows him to redeem.⁵¹ Since any redemption by him would inure to the holder of the reversionary interest,⁵² such power to redeem is of little value. Therefore, once the judgment debtor transfers his interest in the property he should not be allowed to convey his naked right to redeem. The right to redeem after the judgment debtor transfers away his interest in the property should be considered personal and non-transferable. To allow another person to enter the redemption picture as the assignee of the naked right to redeem would

⁴⁸ CAL. CODE CIV. PROC. § 701 continues, "The persons mentioned in the second subdivision of this section are . . . termed redemptioners." See note 8 *supra*.

Some other states specifically provide that additional persons are entitled to redeem. For example, in Michigan a lessee who was made a defendant in the foreclosure action and whose lease has an unexpired term of more than three years may redeem. MICH. STATS. ANN. § 27A.6062 (1962). In Montana the wife of the judgment debtor may redeem. MONT. REV. CODES § 93-5834 (1947). See generally OSBORNE 889-99.

⁴⁹ The personal representative of a deceased mortgagor normally may redeem if the court finds that it is for the preservation of the estate. *Estate of Freud*, 131 Cal. 667, 63 Pac. 1080 (1901) (dictum); *Estate of Heydenfeldt*, 117 Cal. 551, 49 Pac. 713 (1897) (estate property may be used to pay redemption price).

⁵⁰ Language in the case of *Lawler v. Gleason*, 130 Cal. App. 2d 390, 279 P.2d 70 (1955), to the effect that a deed given before the sale did not entitle the grantee to redeem as a successor in interest was disapproved, and the case expressly overruled on that point in *Call v. Thunderbird Mortgage Co.*, 58 Cal. 2d 542, 375 P.2d 169, 25 Cal. Rptr. 265 (1962). Of course, a successor in interest who gets his deed after the period of redemption has run out may not then redeem. *Eldridge v. Wright*, 55 Cal. 531 (1880).

⁵¹ *Yoakum v. Bower*, 51 Cal. 539 (1876).

⁵² *Huling v. Seecombe*, 88 Cal. App. 238, 263 Pac. 362 (1928); *Bateman v. Kellogg*, 59 Cal. App. 464, 211 Pac. 46 (1922). Where the judgment debtor redeems by mistake, or there is some other equitable ground for the return of his money, the court may give restitutionary relief. *Bank of America v. McLaughlin*, 37 Cal. App. 2d 415, 99 P.2d 548 (1940); *Bateman v. Kellogg*, *supra*.

accomplish nothing since any redemption by him would inure to another.⁵³

The foreclosure and sale of a junior lien presents a special problem. If a junior obligation is in default before the senior debt, the junior can foreclose and sell the interest of the mortgagor upon which the junior had his lien.⁵⁴ The purchaser at the junior's sale needs protection against a subsequent foreclosure of the senior lien since a senior sale may well leave him with nothing. The junior's purchaser must be allowed to redeem from the senior sale, but he cannot redeem as a creditor having a lien because the lien of the junior was foreclosed and thereby terminated. Consequently, the junior's purchaser is treated as a successor in interest of the mortgagor,⁵⁵ retaining every right of the mortgagor.⁵⁶ Since he redeems from the senior sale as a successor in interest, the effect of the senior sale is terminated, and a subsequent redemption is not possible.⁵⁷

⁵³ Language in *Lawler v. Gleason*, 130 Cal. App. 2d 390, 279 P.2d 70 (1955), to the effect that the right to redeem can be transferred is correct if the transmission is part of the transfer of the debtor's reversionary interest. Language in *Haskins v. Certified Escrow & Mortgage Co.*, 96 Cal. App. 2d 688, 216 P.2d 90 (1950), stating that the debtor transferred only its right of redemption to its assignee is inaccurate since it appears that the debtor transferred its reversionary interest in the property to the assignee who then redeemed. *Haskins* expressly followed *Siegel v. Farrar*, 120 Cal. App. 193, 7 P.2d 319 (1932), in which the reversionary interest of the debtor was also transferred to the successor in interest. See also *Call v. Thunderbird Mortgage Co.*, 58 Cal. 2d 542, 375 P.2d 169, 25 Cal. Rptr. 265 (1962), which expressly overrules *Lawler v. Gleason*, *supra*, on another point, but apparently overlooked this point.

⁵⁴ For what must be alleged in the complaint see *Carpentier v. Brenham*, 50 Cal. 549 (1875). There can be no sale under a junior lien if the junior lienor was made a party to a prior senior foreclosure action since the junior's lien is ended except for purposes of redeeming from the senior sale. See note 17 *supra*.

The early case of *Bristol v. Hershey*, 7 Cal. App. 738, 95 Pac. 1040 (1908), held that a junior lienor who was made a party to the senior foreclosure action but neither asked for nor received any affirmative relief could maintain an original foreclosure action. This is apparently wrong. The case further stated that the purchaser at such a junior sale was a successor in interest of the mortgagor, but since the purchaser was only a successor in interest to the equitable interest of the mortgagor, he redeemed from the senior sale in his own right, and the effect of the sale was not terminated. In other words, the purchaser was treated as a creditor having a lien although he was called a successor in interest. The result was the same as if no sale had been allowed and the purchaser at the junior sale was merely the assignee of the junior lienor's interest. This is the correct result, although the reasoning of the court in reaching the result seems erroneous and unnecessary.

A junior lienor not made a party to the senior foreclosure action is not affected by it, unless he was not of record. *Montgomery v. Tutt*, 11 Cal. 307 (1858). A junior lienor who was not properly of record is bound by the decree and his equity of redemption is foreclosed as though he was made a party to the senior's action. CAL. CODE CIV. PROC. § 726. See also CAL. CIV. CODE § 1214.

⁵⁵ *Pollard v. Harlow*, 138 Cal. 390, 71 Pac. 454 (1903).

⁵⁶ *Alexander v. Greenwood*, 24 Cal. 505 (1864).

⁵⁷ *Pollard v. Harlow*, 138 Cal. 390, 71 Pac. 454 (1903); *Bateman v. Kellogg*, 59 Cal. App. 464, 211 Pac. 46 (1922).

A person entitled to redeem from the junior sale may do so as long as the period of redemption on the junior sale continues to run, however, and such a redemptioner can pay off both the junior and the senior sale amounts and own the property outright, provided that no further redemptions were possible under the junior sale.⁵⁸

Cases may occur where a person mortgages his property to secure the debt of another. If the debtor defaults, the mortgagor will not be the judgment debtor, nor does he have a lien on the property which would entitle him to redeem his land as a redemptioner. Such an owner should be allowed to redeem as a successor in interest, or as what might be called a "quasi-successor in interest." It would not be equitable to bar the true owner of the property from a chance to regain his estate under such circumstances.

Dictum in the case of *Clark v. Cuin*⁵⁹ indicates that the purchaser at any foreclosure sale, even a single senior sale, becomes a successor in interest of the mortgagor for purposes of redeeming from the sale at which he became the purchaser, thereby being entitled to re-redeem from one who redeems from him.⁶⁰ If this dictum were actually applied, the purchaser would be able to buy in property with a value greater than the amount of all liens encumbering it and never be in danger of losing the property, except to the mortgagor;⁶¹ he could re-redeem from any redemptions by redemptioners and be money ahead since the property is worth more than any liens he may have to pay. Moreover, if he is considered a successor in interest, the purchaser could terminate further redemptions by redeeming from himself and thereby end the effect of the sale.⁶² This would result in cutting out the mortgagor, even within the twelve-month period specifically provided by statute.⁶³ Under this theory it is also possible that if the mortgagor himself redeemed from

⁵⁸ In the event that the person entitled to redeem from the junior sale pays only the amount needed to redeem from the junior sale alone, the person redeemed from would hold an equitable lien for the amount he paid to redeem from the senior sale. The junior's redemptioner would then hold the property subject to the equitable lien.

⁵⁹ 46 Cal. 2d 386, 295 P.2d 401 (1956).

⁶⁰ "Under the terms of section 701 either the [mortgagor] . . . or [the redeemed from purchaser] . . . could have redeemed from [the redemptioner] . . . by following the prescribed statutory steps . . ." *Clark v. Cuin*, 46 Cal. 2d 386, 393, 295 P.2d 401, 405 (1956).

⁶¹ The threat that the mortgagor would redeem is probably minimal since the mortgagor was not even able to raise sufficient funds to make the original mortgage payments.

⁶² Under the approach of *Call v. Thunderbird Mortgage Co.*, 58 Cal. 2d 542, 375 P.2d 169, 25 Cal. Rptr. 265 (1962), in which it was said that a purchase by a successor in interest has the effect of a redemption by him, it is possible that the mere purchase by the purchaser could be considered a redemption and the sale would then be ended. See notes 160-68 *infra* and accompanying text.

⁶³ See note 26 *supra*.

the purchaser, the redemption would inure to the benefit of the purchaser in his role of successor in interest.⁶⁴

It is clear that treating the purchaser as the successor in interest of the mortgagor for the purposes of redeeming from the same sale at which he purchased would produce absurd results. Moreover, there is no need to so consider him. It is well established that the purchaser obtains no interest which survives a redemption.⁶⁵ Whether the purchase is at a junior or a senior foreclosure sale, the purchaser's title is conditional and the happening of the condition, a valid redemption, ends his interest in the property.⁶⁶ Thus, after the purchaser is paid the amount which he has invested in the property, plus the requisite interest and expenses, he has nothing to protect, and, therefore, should be eliminated as an eligible redeemer.

Other problems arise when cotenants mortgage the cotenancy property, and the mortgage is foreclosed. In that event *any* cotenant can redeem the property.⁶⁷ The redeeming cotenant must redeem the entire property, and cannot merely redeem his interest since the redemption is from the sale of the entire property.⁶⁸ The redemption is for the benefit of the cotenancy and not merely for the redeeming cotenant.⁶⁹ The redeeming cotenant, however, is given an equitable lien for contribution on the interests of the non-contributing cotenants. This lien may be foreclosed and the encumbered interests sold if the other cotenants do not contribute to the redemption.⁷⁰

A trustee in bankruptcy is vested with the title and rights of the bankrupt in property.⁷¹ He is therefore entitled to redeem the property of the bankrupt under the statutory right of redemption as a successor in interest. The trustee in bankruptcy is also given a lien on all of the property of the bankrupt on which a creditor of the bankrupt could have obtained a lien on the date of the bankruptcy.⁷² Such a lien entitles

⁶⁴ See note 52 *supra* and accompanying text.

⁶⁵ "[T]he purchaser of real estate at execution sale acquires the legal title to the land, subject to defeasance by the happening of the condition subsequent [a redemption]." Pollard v. Harlow, 138 Cal. 390, 393, 71 Pac. 454, 455 (1903).

⁶⁶ See note 20 *supra* and accompanying text.

⁶⁷ The lien of a mortgage on the interest of a joint tenant is ended upon the death of the mortgagor, if the mortgagor pre-deceases the other joint tenant. This is because the interest of the deceased joint tenant goes to the survivor by operation of law. People v. Nogarr, 164 Cal. App. 2d 591, 330 P.2d 858 (1958).

⁶⁸ Huntington v. Perrin, 65 Cal. App. 20, 223 Pac. 94 (1923). See also Emerson v. Yosemite Gold Min. & Mill. Co., 149 Cal. 50, 85 Pac. 122, *aff'd*, 208 U.S. 25 (1906).

⁶⁹ Warner Bros. v. Freud, 138 Cal. 651, 72 Pac. 345 (1903).

⁷⁰ Warner Bros. v. Freud, *supra* note 69; Calkins v. Steinbach, 66 Cal. 117, 4 Pac. 1103 (1884).

⁷¹ Federal Bankruptcy Act § 70(a), 52 Stat. 879 (1938), 11 U.S.C. § 110 (1958).

⁷² Federal Bankruptcy Act § 70(c), 66 Stat. 429 (1952), 11 U.S.C. § 110 (1958).

the trustee also to redeem from a foreclosure sale as a creditor having a lien. The trustee can redeem in whatever status best suits the exigencies of the situation at the time the redemption is made.⁷³

B. Redemptioners

The question of who qualifies as a redemptioner⁷⁴ is more complex. The statute allowing junior lienors to redeem is designed to protect lienors who are in danger of losing their security. Clearly, a junior mortgagee is entitled to redeem as long as he retains his lien.⁷⁵ Although the lien of a junior mortgagee or lienor is said to be extinguished if he is made a party to the senior foreclosure action, it remains alive for the purpose of qualifying its holder as a creditor with a lien for redemption purposes.⁷⁶ If the junior lien is foreclosed, either before or after the senior foreclosure—after if the junior lienor was not made a party to the senior foreclosure action⁷⁷—or as part of the same action, the lien is extinguished and neither the junior mortgagee nor the purchaser at the junior sale can redeem as a creditor having a lien.⁷⁸ The purchaser at the junior sale, however, is a successor in interest of the mortgagor, and can redeem in that status.⁷⁹

It is possible that the senior mortgagee will neglect to make a properly recorded junior lienor a party to his foreclosure action. While it is clear that the foreclosure action will not affect the status of the omitted junior,⁸⁰ the alternatives open to the omitted junior are not as clear. Since his status has not been altered by the senior's foreclosure action, he may pursue the remedies he had prior to the senior's foreclosure—the right

⁷³ The trustee in bankruptcy is given at least 60 days in which to redeem no matter in what status he redeems, even if there are less than 60 days remaining in the twelve-month period of redemption. Federal Bankruptcy Act § 11, 66 Stat. 422 (1952), 11 U.S.C. § 29 (1958).

⁷⁴ See note 8 *supra*. Cf. *Fly v. Cline*, 49 Cal. App. 414, 193 Pac. 615 (1920) (mechanic's lien may be sufficient) (dicta); *McDermott v. Burke*, 16 Cal. 580 (1860) (equity may allow lessee to redeem) (dicta). An attachment lien is insufficient to entitle its holder to redeem since it is not based on a judgment, as required by CAL. CODE CIV. PROC. § 701. See *Clark v. Cuin*, 46 Cal. 2d 386, 295 P.2d 401 (1956). The same reasoning would apply to the mechanic's lien.

⁷⁵ The beneficiary of a deed of trust is a creditor having a lien for redemption purposes. *Call v. Thunderbird Mortgage Co.*, 58 Cal. 2d 542, 375 P.2d 169, 25 Cal. Rptr. 265 (1962); *McNutt v. Nuevo Land Co.*, 167 Cal. 459, 140 Pac. 6 (1914). Dicta in the case of *Bateman v. Kellogg*, 59 Cal. App. 464, 211 Pac. 46 (1922), that the beneficiary is a successor in interest, even before the sale under his deed of trust is wrong.

⁷⁶ See note 17 *supra* and accompanying text.

⁷⁷ See notes 80-84 *infra* and accompanying text.

⁷⁸ *Pollard v. Harlow*, 138 Cal. 390, 71 Pac. 454 (1903); *San Jose Water Co. v. Lyndon*, 124 Cal. 518, 57 Pac. 481 (1899).

⁷⁹ See notes 54 & 55 *supra* and accompanying text.

⁸⁰ *Frink v. Murphy*, 21 Cal. 108 (1862); *Montgomery v. Tutt*, 11 Cal. 307 (1858).

to foreclose on the interest of the mortgagor upon which he has a lien and the right to redeem from the senior *lien* by exercising his unforced equity of redemption.⁸¹ Since the omitted junior is also a "creditor having a lien subsequent to that under which the property was sold," it would appear that he also falls within the statutory description of those entitled to redeem from the *sale*. It has been argued that since the omitted junior is not affected by the senior foreclosure proceedings, nor by the sale under the senior foreclosure decree, no statutory right of redemption should be allowed.⁸² Although no California case has had to deal with the situation directly, dicta in several decisions indicate that the omitted junior should be allowed to exercise the statutory right of redemption.⁸³ It is submitted that as long as the omitted junior retains his lien he should be allowed to avail himself of either type of redemption until the running of the statutory period again relegates him to his equity of redemption alone.⁸⁴ Should the omitted junior redeem from the sale, his interest in the property will be settled without the necessity for further proceedings and will result in a more simplified transaction, benefiting all involved. Since he was omitted from the senior foreclosure action through no fault of his own, the junior lienor should not be deprived of the remedy which he would have had if he had been made a party.

When one is seeking to redeem under a judgment lien, the time of the acquisition of the judgment is not material if it is recorded before the period of redemption has expired. Although it was not always true,⁸⁵

⁸¹ CAL. CIV. CODE § 2903.

⁸² In *Portland Mortgage Co. v. Creditors Protective Ass'n*, 199 Ore. 432, 262 P.2d 918 (1953), it was held that an omitted junior has only his equity of redemption and gets only the senior lien when he redeems. The purchaser at the senior sale has the mortgagor's equity of redemption and can re-redeem from the junior. See also 1 GLENN, MORTGAGES § 86.5 (1943); 2 GLENN, MORTGAGES § 238 (1943); 2 JONES, MORTGAGES § 1376 (8th ed. 1928); OSBORNE 994-96; Note, 88 U. PA. L. REV. 994 (1940).

⁸³ *Tuolumne Redemption Co. v. Sedgwick*, 15 Cal. 515 (1860) (concurring opinion of Field, C.J.). In *Whitney v. Higgins*, 10 Cal. 547, 554 (1858), the court said, "[P]arties obtaining interests subsequent to the [senior mortgagee], and before suit is brought, who are not made parties to such suit, possess both the equitable and the statutory right. They may redeem, under the statute, or they may file their bill in equity." Cf. *Alexander v. Greenwood*, 24 Cal. 505 (1864); *Frink v. Murphy*, 21 Cal. 108 (1862); *Whemple v. Yosemite Gold Min. Co.*, 4 Cal. App. 78, 87 Pac. 280 (1906). See also cases collected in 134 A.L.R. 1490 (1941).

⁸⁴ Problems arise as to how much such an omitted junior should pay to redeem both before and after the period of redemption has run. For a consideration of these problems see notes 107-112 *infra* and accompanying text.

⁸⁵ *E.g.*, *People v. Irwin*, 14 Cal. 428 (1859) (judgment after sale did not make creditor a redemptioner). Some of the early cases held that since the mortgagor retained the legal title during the period of redemption, a judgment obtained before the period of redemption expired attached as a lien on the legal title. *E.g.*, *McMillan v. Richards*, 9 Cal. 365 (1858).

it is now recognized that a judgment recorded either before or after the sale entitles the judgment creditor to redeem as a redemptioner.⁸⁶ However, if the mortgagor conveys his interest in the property for an adequate consideration and not in fraud of creditors⁸⁷ before the judgments against him are recorded, the judgment creditors should not be allowed to redeem since the judgment debtor no longer has an interest in the property to which the judgment liens can attach. This is true whether the conveyance of the debtor's interest is before or after the sale since a conveyance of the debtor's reversionary interest eliminates that interest from any future lien. Likewise, a deficiency judgment obtained in the same action in which the mortgage was foreclosed is not a lien on the property which entitles the judgment creditor to redeem as a creditor with a lien.⁸⁸ The deficiency judgment will attach as a lien only if the judgment debtor redeems and the property reverts in him. The priority of the deficiency judgment is determined by the date of its recordation, and not from the date of the original lien under which the foreclosure and sale were obtained. Thus, the liens which were junior to the lien under which the foreclosure was made are now prior to the lien of the deficiency judgment.⁸⁹

Under the same analysis, when the sale is held under the lien of a

⁸⁶ *Salsbery v. Ritter*, 48 Cal. 2d 1, 306 P.2d 897 (1957); *Clark v. Cuin*, 46 Cal. 2d 386, 295 P.2d 401 (1956); *Corporation of America v. Eustace*, 217 Cal. 102, 17 P.2d 723 (1932); *Stetson v. Sheehan*, 52 Cal. App. 353, 200 Pac. 387 (1921). If the mortgagor transfers the property to a successor in interest before the sale, the creditors of the successor in interest can redeem.

⁸⁷ Judgment creditors need not fear a fraudulent conveyance since their liens attach to property fraudulently conveyed; the grantor retains his interest in property so conveyed. *McGee v. Allen*, 7 Cal. 2d 468, 60 P.2d 1026 (1936). Since the deficiency judgment does not entitle the creditor to reach the debtor's redemption right, it is not a fraudulent conveyance as to such a creditor for the judgment debtor to convey his reversionary interest to a third person during the period of redemption, even if no consideration for the transfer is received. The deficiency judgment creditor only has the right to reach the debtor's interest which is restored to him upon a redemption. *Haskins v. Certified Escrow & Mortgage Co.*, 96 Cal. App. 2d 688, 216 P.2d 90 (1950); *Siegel v. Farrar*, 120 Cal. App. 193, 7 P.2d 319 (1932). See also notes 88-90 *infra* and accompanying text.

⁸⁸ *Black v. Gerichten*, 58 Cal. 56 (1881); *Simpson v. Castle*, 52 Cal. 644 (1878).

CAL. CODE CIV. PROC. § 701 specifies that the lien of a creditor must be subsequent to that on which the property was sold. If a deficiency judgment was allowed to be a lien under which the judgment creditor could redeem, and if the mortgagee-judgment creditor purchased at the sale, he could re-redeem from a redemptioner who redeemed from his purchase. This would allow him to speculate by bidding in at a lower price than he normally would bid since he has a means of regaining the property should anyone redeem from him by paying the lower price at which he bid in. If no one redeemed, the mortgagee-judgment creditor would have the property and any deficiency judgment he could obtain. If a redemption was made, he would merely have to re-redeem under the lien of his deficiency judgment. The anti-deficiency legislation, however, has minimized the possibility of the mortgagee bidding in at a price less than the fair market value of the property. See note 5 *supra*.

⁸⁹ *Black v. Gerichten*, *supra* note 88, *Simpson v. Castle*, *supra* note 88.

money judgment and the amount received at the sale is insufficient to cover the amount of the judgment, the unpaid balance of the judgment should reattach to the property if the judgment debtor redeems and is restored to his estate. While the courts have not yet passed on the question directly, under California Code of Civil Procedure Section 674 the original recorded judgment should constitute a lien on the property when it is regained by the debtor. Under that section a recorded judgment becomes a lien on the property of the judgment debtor in the county of recordation whether the property is owned by the debtor at the time of recordation or afterward acquired by him. The property redeemed by the debtor is after-acquired property to which the unsatisfied portion of the judgment can attach.⁹⁰

One may not redeem under a void judgment, and the person from whom he seeks to redeem may challenge its validity.⁹¹ The creditor of one cotenant may redeem from a senior sale under a lien which covered the entire cotenancy property, but he must redeem it all, not merely the part on which he had his lien.⁹² This is because he is making a statutory redemption of all that was sold, and not a redemption under his own equity of redemption, which was foreclosed.⁹³ When one mortgage secures several notes held by different persons, any of the note holders may redeem from the purchaser at a sale held pursuant to the foreclosure of any of the other notes.⁹⁴

⁹⁰ While no deficiency judgment as such is obtainable under such a partially satisfied judgment, the judgment creditor could bring another action for the unpaid portion of the debt, and when that judgment is recorded it would become a lien on the property of the judgment debtor. The priority of the lien would date from the time of recording. However, the requirement of obtaining a second judgment for the unpaid balance of the original debt is uneconomical. There is no practical reason for requiring a second action since a lien for the unsatisfied portion of the original judgment could attach to the regained property with the same priority as all other junior liens existing at the time of the redemption by the judgment debtor.

⁹¹ *Bennett v. Wilson*, 122 Cal. 509, 55 Pac. 390 (1898).

⁹² *Corporation of America v. Eustace*, 217 Cal. 102, 17 P.2d 723 (1932); *Eldridge v. Wright*, 55 Cal. 531 (1880). *But see* *People v. Nogarr*, 164 Cal. App. 2d 591, 330 P.2d 858 (1958) (lien on interest of joint tenant ended by his death).

⁹³ See text accompanying note 11 *supra*. An omitted junior lienor, however, retains his unforced equity of redemption under which he may redeem only the interest which is subject to his junior lien. *Carpentier v. Brenham*, 50 Cal. 549 (1875); *Carpentier v. Brenham*, 40 Cal. 221 (1870); *Tuolumne Redemption Co. v. Sedgwick*, 15 Cal. 515 (1860). As protection against the omitted junior lienor, the purchaser has an equitable lien with the same priority as the mortgage under which the sale was held. *Carpentier v. Brenham*, 50 Cal. 549 (1875); *Carpentier v. Brenham*, 40 Cal. 221 (1870).

⁹⁴ *Grattan v. Wiggins*, 23 Cal. 16 (1863). The discharge in a bankruptcy proceeding of the judgment under which a lien was obtained will probably not alter the status of a redemptioner since a valid lien is not nullified by bankruptcy proceedings. 66 Stat. 427 (1952), 11 U.S.C. § 107 (1958). See also *Salsbery v. Ritter*, 48 Cal. 2d 1, 306 P.2d 897 (1957).

It can be argued that under the language of California Code of Civil Procedure Section 701 a judgment creditor of the *purchaser* is entitled to redeem by virtue of the lien which he obtains by recording his judgment.⁹⁵ The section provides that a creditor having a lien subsequent to that on which the property was sold may redeem and inasmuch as the purchaser obtained the legal title to the property by his purchase, his judgment creditor obtains a lien on the property subsequent to that under which the property was sold. But the clear purpose of the foreclosure and redemption process is to settle the claims of the *mortgagor's* creditors and not those of the purchaser. Allowing both the mortgagor's *and* the purchaser's creditors to become involved would create unnecessary confusion. For example, what would a junior creditor of the mortgagor have to pay in order to redeem? Redemptioners with prior liens are not required to pay the amount of subsequent liens, but redemptioners with subsequent priority are required to pay liens held by the prior redeeming redemptioner which attached prior to their own.⁹⁶ Forcing a subsequent redemptioner to pay the debt of the purchaser, who is essentially a stranger to the transaction, seems unjust. Similarly, if the mortgagor wanted to redeem, he apparently would have to pay the lien of the purchaser's creditor.⁹⁷ Requiring the mortgagor to pay someone else's debts in order to redeem his own property seems particularly unjust in view of the obvious difficulty he has had in paying his own debts. Allowing another person's debts to become intermingled in the transaction would serve no useful purpose. The lien of the purchaser's creditor should be considered sufficient to encumber the purchaser's conditional interest, but insufficient to entitle the creditor to redeem. This would adequately protect the purchaser's creditor and the redemption process would not be impeded.

It is not uncommon that one unqualified to redeem either as a redeemer or as a redemptioner is erroneously allowed to effect what appears to be a redemption. Although there has been some uncertainty in the courts as to the effect of such a "volunteer redemption,"⁹⁸ the better view is that it is merely a sale and assignment of the certificate of sale, or of the certificate of redemption if the redemption is from a redemptioner.⁹⁹

⁹⁵ CAL. CODE CIV. PROC. § 674.

⁹⁶ See note 103 *infra* and accompanying text.

⁹⁷ See note 105 *infra* and accompanying text.

⁹⁸ *White v. Costigan*, 134 Cal. 33, 66 Pac. 78 (1901) (redemption good by estoppel); *Abadie v. Lobero*, 36 Cal. 390 (1868) (volunteer redemption may be valid).

⁹⁹ *McNutt v. Nuevo Land Co.*, 167 Cal. 459, 140 Pac. 6 (1914); *Bateman v. Kellogg*, 59 Cal. App. 464, 211 Pac. 46 (1922); *Evalina Gold Mining Co. v. Yosemite Gold M. & M. Co.*, 15 Cal. App. 714, 115 Pac. 946 (1911).

The volunteer-assignee has only the rights of his assignor, and the period of redemption is not altered by the assignment.

III

HOW MUCH MUST BE PAID TO REDEEM

Sections 702 and 703 of the California Code of Civil Procedure list the items which must be paid to redeem. These items include: the amount of the purchase or prior redemption, interest on this amount,¹⁰⁰ assessments, taxes, fire insurance, repair, maintenance and upkeep expenses, and by recent amendment,¹⁰¹ "any sum paid on a prior obligation secured by the property to the extent such payment was necessary for the protection of . . . [the interest of the person redeemed from]."¹⁰² In addition, if the person redeemed from has a lien prior to that of the person seeking to redeem, the redemptioner must pay the amount of that lien.¹⁰³ A redemptioner who pays the amount of such a prior lien is subrogated to it, and subsequent redemptioners must pay the amount of that lien in addition to all other liens held by the redemptioner which are senior to the liens under which they claim their right to redeem.¹⁰⁴ The judgment debtor or his successor in interest must pay the same amounts as are required of the most junior redemptioner.¹⁰⁵ This means that the judgment debtor or his successor in interest must pay the amount of any mortgages or liens held by the person from whom he redeems, whether or not such mortgages are in default at that time.¹⁰⁶

¹⁰⁰ Section 702 provides that 2/3 of 1% of the purchase price per month must be paid when redemption is made from the purchaser. Section 703 provides that 2% of the amount paid to redeem by the prior redemptioner must be paid in addition to such other amounts as are required when redemption is made from a redemptioner.

¹⁰¹ Cal. Stats. 1963, ch. 204.

¹⁰² Interest is added to these items. CAL. CODE CIV. PROC. §§ 702 & 703 were amended to eliminate the uncertainty which existed under the prior statutes when the purchaser or redemptioner made payments on an installment land contract or a prior mortgage or lien in order to prevent being ousted by proceedings which could have been brought in the event such payments were not made. While it is probable that the purchaser or redemptioner could demand repayment for such expenditures under a subrogation theory, *Jones v. Gore*, 141 Cal. App. 2d 667, 297 P.2d 474 (1956), CAL. CIV. CODE §§ 2903, 2904, the code amendments firmly establish this right. See 38 CAL. S.B.J. 493 & 676 (1963); 37 CAL. S.B.J. 594 (1962). The amendments also contain provision for summary judicial determination of disputes as to any charge sought to be added to the amount required for redemption. Prior to this change such judicial determination was limited to disputes concerning amounts paid for fire insurance, maintenance, upkeep, and repairs.

¹⁰³ The judgment under which the property was sold need not be so paid. CAL. CODE CIV. PROC. §§ 702, 703.

¹⁰⁴ CAL. CODE CIV. PROC. § 703. See also note 39 *supra*.

¹⁰⁵ *Ibid.*

¹⁰⁶ *Salsbery v. Ritter*, 48 Cal. 2d 1, 306 P.2d 897 (1957). This result has been severely criticized. See, e.g., Note, 45 CALIF. L. REV. 191 (1957). Cf. *Riesenfeld, Creditors' Rights*,

A. *The Omitted Junior Lienor*

An interesting situation arises when an omitted junior lienor is allowed to redeem under his unforeclosed equity of redemption as well as under the statutory right of redemption.¹⁰⁷ If the omitted junior chooses to redeem under the statutory right of redemption, which he probably would do if the purchase price were less than the amount of the senior lien, he must do so before the period of redemption has expired and pay the amounts which would have to be paid by an ordinary redemptioner of his priority. If he is not redeemed from during the period of redemption, the sheriff's deed received after the period has run will give him clear title.

If the omitted junior lienor chooses to exercise his unforeclosed equity of redemption, which was not affected by the foreclosure action to which he was not made a party, he can do so at any time, before or after the sale. If he exercises his equity of redemption before the foreclosure sale, he must, of course, pay the amount of the senior lien and thereby becomes subrogated to it. The mortgagor then owns the property subject to the liens held by the junior plus any other liens which reattach to the property. If he exercises his equitable right to redeem after the foreclosure sale, either during or after the period of statutory redemption, he probably can redeem under his equity of redemption by paying the amount of the senior lien or so much thereof that subsists, that is, the amount which the purchaser paid at the sale. The omitted junior lienor is satisfying the senior lien when he exercises his equitable right to redeem. The senior lien is extinguished by the foreclosure action pursuant to which the sale was held,¹⁰⁸ except insofar as equity requires that it be kept alive for the protection of the purchaser against junior liens.¹⁰⁹

6 SURVEY OF CAL. LAW 148, 149 (1955), stating that the policy of the redemption statutes is to favor debtors, as evidenced by the allowance of a full twelve months within which the debtor can redeem. Professor Riesenfeld argues that requiring the debtor to pay the amounts of unmatured notes does not further this policy, and that therefore, the notes should not be due until they have matured. Many junior mortgages, however, provide that the default in the senior mortgage is a default in the junior which accelerates the junior debt. *But see* CAL. CIV. CODE § 2924c.

¹⁰⁷ See notes 80-84 *supra* and accompanying text.

¹⁰⁸ See *San Jose Water Co. v. Lyndon*, 124 Cal. 518, 57 Pac. 481 (1899).

¹⁰⁹ "The purchasers at the foreclosure sale sustained a twofold relation to the junior mortgagee: First, as having acquired the legal title of the mortgagor; and second, as having become in equity, the assignees of the debt secured by the first mortgage, or *at least so much thereof as was satisfied by the foreclosure sale.*" (Emphasis added.) *Carpentier v. Brenham*, 40 Cal. 221, 239 (1870).

In *Whitney v. Higgins*, 10 Cal. 547 (1858), the court stated that the assignee of the purchaser under a mechanic's lien sale "is entitled to the amount due upon that lien to the extent of the money paid upon the purchase" from the purchaser under an omitted junior lienor's foreclosure sale who now seeks to redeem. 10 Cal. at 553.

Since the purchaser requires protection only up to the amount which he paid to purchase, plus such other expenses as are allowed,¹¹⁰ the senior lien should survive as an equitable lien only up to the amount of the purchase price plus expenses, and that should be all that the omitted junior must pay.

Procedurally, it is not necessary for the omitted junior lienor to redeem under his unforeclosed equity of redemption and then foreclose his junior lien. The omitted junior merely brings a foreclosure action under his previously unforeclosed lien and expressly recognizes the priority of the senior lien.¹¹¹ The court should decree foreclosure of the junior lien and at the resulting sale the person holding the surviving senior lien—the purchaser's equitable lien—has first claim to the proceeds in an amount sufficient to satisfy his lien, the excess going to the foreclosing junior in an amount sufficient to satisfy his lien. It is true that if the purchase price was more than the amount of the senior lien, the purchaser will probably only recover the amount of the senior lien and lose the excess amount which he paid. The purchaser had constructive notice of the junior lienor's claim, however, and incurred his loss by failing to check the record.¹¹²

B. Value of Use of Property During Redemption Period

Although the judgment debtor is entitled to possession during the period of redemption,¹¹³ Section 707 of the California Code of Civil Procedure provides that the purchaser or redemptioner is entitled to the rents of the property, or the value of its use and occupation, from the

Matzen v. Shaeffer, 65 Cal. 81, 3 Pac. 92 (1884), dealt with a case where the vendee of land paid off the senior mortgage as part of the purchase price. The court held that the payment resulted in an equitable assignment of the lien to the vendee as protection against the outstanding junior liens. The court cited 3 POMEROY, EQUITY JURISPRUDENCE § 1212 (1st ed. 1881), which states that the senior lien should be kept alive "so far as may be necessary in equity for his own benefit; he is subrogated to the rights of the mortgagee to the extent necessary for his own equitable protection." 65 Cal. at 82, 3 Pac. at 92.

¹¹⁰ See notes 100-105 *supra* and accompanying text.

¹¹¹ See Carpentier v. Brenham, 40 Cal. 221 (1870). The junior can raise any defenses he has against the senior lien at the time of his foreclosure action and if successful will be free of the prior incumbrance. Frates v. Sears, 144 Cal. 246, 77 Pac. 905 (1904); Carpentier v. Brenham, *supra*. On the other hand, the purchaser may obtain a decree in equity which allows the omitted junior a specific time within which he may redeem at the peril of having the purchaser's title quieted against him. See, e.g., Fox v. California Title Ins. Co., 120 Cal. App. 264, 7 P.2d 722 (1932).

¹¹² See note 54, *supra*. The purchaser has a reasonable time to inspect the record after his bid is accepted and he may petition to be released from his bid if he discovers irregularities. Boggs v. Fowler & Hargrave, 16 Cal. 559 (1860). See also CAL. CODE CIV. PROC. § 708. See generally, OSBORNE 956-59.

¹¹³ Petersen v. Jurras, 2 Cal. 2d 253, 40 P.2d 257 (1935). See also cases cited note 24 *supra*.

tenant in possession¹¹⁴ from the time such purchaser or redemptioner acquires his interest until he is redeemed from. Any rents or profits so received, however, are a credit on the amount which must be paid in order to accomplish a subsequent redemption.¹¹⁵ If the purchaser himself takes possession after the sale he is liable to a subsequent redeemer or redemptioner for the value of his own occupancy.¹¹⁶ If there is a tenant on the property under a lease, he is liable to the purchaser for the rents,¹¹⁷ even though the rent has been prepaid to the mortgagor-lessor.¹¹⁸ If the mortgage was executed before the lease, a rental payment not due until after the sale which covers a period including time both before and after the sale must be apportioned between the mortgagor-lessor¹¹⁹ and the purchaser at the sale.¹²⁰ If the lease precedes the mortgage, the interest which is mortgaged does not include the right to possession of the land for the term of the lease; it is rather the mortgagor's reversion and his right to the rents under the lease when they become due which are given as security.¹²¹ Therefore, if the mortgage is foreclosed and the mortgaged

¹¹⁴ The purchaser is entitled to the fair rental value of the property from whomever is in actual possession. *Carpentier v. Hamilton*, 24 Cal. 2d 95, 147 P.2d 563 (1944) (judgment debtor himself); *Walker v. McCusker*, 71 Cal. 594, 12 Pac. 723 (1887) (whoever is in actual possession); *Walls v. Walker*, 37 Cal. 424 (1869) (personal representative of deceased mortgagor); *Shores v. Scott River Co.*, 21 Cal. 135 (1862) (principal, if agent is in possession); *Knight v. Truett*, 18 Cal. 113 (1861) (junior mortgagee); *Bessinger v. Grotz*, 66 Cal. App. 2d 947, 153 P.2d 369 (1944) (vendee). "The word *tenant* as used in section 707 is not used in the specific sense, as referring to the relation of landlord and tenant, but is employed in its generic sense, indicating one who holds possession of land by any kind of title." *Bessinger v. Grotz*, *supra* at 949, 153 P.2d at 370.

¹¹⁵ CAL. CODE CIV. PROC. § 707 provides for an extension of the period of redemption until after an accounting pursuant to a written demand made during the period of redemption by one entitled to redeem.

If the rents during the period of redemption exceed the amount needed to redeem and the judgment debtor or his successor in interest redeems, the redeemer, and not the purchaser, is entitled to the excess. *Christensen v. Forst*, 153 Cal. App. 2d 465, 314 P.2d 746 (1957).

¹¹⁶ *House v. Lala*, 214 Cal. App. 2d 238, 29 Cal. Rptr. 450 (1963).

¹¹⁷ *Munzinger v. Caffrey*, 49 Cal. App. 2d 180, 121 P.2d 13 (1942).

¹¹⁸ *Harris v. Foster*, 97 Cal. 292, 32 Pac. 246 (1893) (purchaser of a one-half interest gets one-half of the rents); *Webster v. Cook*, 38 Cal. 423 (1869); *Munkelt v. Kumberg*, 22 Cal. App. 2d 369, 70 P.2d 997 (1937).

When the rent is to be paid in crops, the designated crops belong to the purchaser and are treated as rent, not as crops. *Shintaffer v. Bank of Italy*, 216 Cal. 243, 13 P.2d 668 (1932); *Clarke v. Cobb*, 121 Cal. 595, 54 Pac. 74 (1898). This is to be distinguished from the usual case in which crops are considered as part of the realty until severed, and if severed during the period of redemption, they are subject to disposition by the person entitled to possession during the period of redemption. See generally *Silveira v. Ohm*, 33 Cal. 2d 272, 201 P.2d 387 (1949); *Clarke v. Cobb*, *supra*; *Scott v. Hotchkiss*, 115 Cal. 89, 47 Pac. 45 (1896); *Smith, Security Interests in Crops*, 10 HASTINGS L. J. 156 (1958).

¹¹⁹ *Becker v. Munkelt*, 27 Cal. App. 2d 761, 81 P.2d 1041 (1938).

¹²⁰ *Clarke v. Cobb*, 121 Cal. 595, 54 Pac. 74 (1898).

¹²¹ See *Smith*, *supra* note 118, at 164-65.

interest sold prior to the payment of the rent under such a lease, the *entire* rental payment belongs to the purchaser.¹²²

A tenant does not become the tenant of the purchaser by virtue of the sale, but remains the tenant of his lessor.¹²³ Thus, a problem arises after the sale and during the period of redemption if the mortgagor-lessor seeks to collect the payments due to him under the lease contract. While the purchaser is entitled to the rents, he cannot enjoin the mortgagor from collecting them.¹²⁴ In order to protect the tenant, who in the absence of interpleader is liable to two persons for the same rent, Section 564(4) of the California Code of Civil Procedure was amended in 1941 to allow for the appointment of a receiver to collect the rents and to disburse them as directed by the court. Prior to this amendment no receiver could be obtained for the collection of rent.¹²⁵

While the availability of a receiver eased the situation where a lease is involved, the purchaser still cannot get a receiver to collect the profits, or to preserve the value of the use by the mortgagor.¹²⁶ Although provision is made for the enjoining of waste,¹²⁷ there may be use of the land by the person in possession not amounting to waste which nevertheless should be restrained, or at least made subject to a receiver in order to protect the interests of the purchaser.¹²⁸ Courts should be allowed to exercise discretion in determining whether an injunction or a receiver is merited by the facts of the individual case. While the policy of allowing the mortgagor to retain and use the land should be preserved, such use should not be permitted to work to the detriment of the purchaser, who is entitled by law to the beneficial interest in the land from the time of his purchase.

¹²² *Cf. Fowler v. Lane Mortgage Co.*, 58 Cal. App. 66, 207 Pac. 919 (1922).

¹²³ *McClintock v. Powley*, 210 Cal. 333, 291 Pac. 833 (1930). If the tenant paid his lessor before he had actual or constructive notice of the sale, he apparently would be held harmless, and the lessor alone would be liable for the rents received. *Title Ins. & Trust Co. v. Pfenninghausen*, 57 Cal. App. 655, 207 Pac. 927 (1922).

¹²⁴ *First Nat'l Trust & Sav. Bank of San Diego v. Staley*, 219 Cal. 225, 25 P.2d 982 (1933).

¹²⁵ *Boyd v. Benneyan*, 204 Cal. 23, 266 Pac. 278 (1928); *Mau, Sadler & Co. v. Kearney*, 143 Cal. 506, 77 Pac. 411 (1904); *West v. Conant*, 100 Cal. 231, 34 Pac. 705 (1893).

¹²⁶ *Ibid.*

¹²⁷ CAL. CODE CIV. PROC. § 706.

¹²⁸ An example is where there are crops on the land which are in themselves insufficient to cover the value of the use of the land, and there is a threat that they will be removed by an insolvent mortgagor and given to a third person. See *West v. Conant*, 100 Cal. 231, 34 Pac. 705 (1893).

The result of the statutes as they stand is to allow the judgment debtor or his assignee to get all he can out of the land before he is required to turn it over to the purchaser. The developments in this area may depend upon whether the court which is called upon to interpret the statutes is debtor or creditor oriented.

The case of *Bessinger v. Grotz*¹²⁹ raises the question of just how far the court will go in finding that proceeds obtained by the purchaser in an attempted sale of the purchased land are rents and profits which can be used as a set-off against the redemption price. The *Bessinger* case involved an installment land contract entered into during the period of redemption by the purchaser as vendor and the person who was in actual possession of the purchased land as vendee. Under the contract the vendee was to pay the vendor seventy-five dollars per month until the total purchase price was paid, at which time the vendor was to transfer title to the property to the vendee. The court held that the payments under the contract during the period of redemption were profits from the land, and, therefore, were a credit on the amount required for redemption by the mortgagor.¹³⁰

Specifically, the problem is whether the sale of the land by the purchaser can be confirmed by the mortgagor, or even by a redemptioner, thereby allowing the vendee to take or retain possession, and entitling the mortgagor or redemptioner to treat the amount received by the purchaser as a credit on the redemption price. Any amount over the redemption price would be the profit of the person who redeemed. This situation probably will seldom arise: if the prospective buyer checks the record, he will discover that his prospective vendor has only a conditional title, and it is unlikely that he will be willing to purchase such an interest. If the vendee is satisfied with the conditional title, however, the sale of such title by the purchaser should be regarded as an assignment of the certificate of sale, just as in the case of a volunteer redemption.¹³¹ The vendee would then stand in the shoes of the purchaser, and would be hable to the mortgagor for the rents and profits as a "tenant in possession."¹³² The mortgagor should not have any claim to the proceeds from such a transaction since the payment was for the assignment and not for the use of the land. Similarly, if during the period of redemption the purchaser enters into a contract by which he agrees to sell the land upon his receipt of the sheriff's deed, any consideration for such an agreement would not be for the use of the land. Even if the purchaser purported to sell the land outright to a vendee who was unaware that the purchaser's title was conditional,¹³³ the mortgagor should not be

¹²⁹ 66 Cal. App. 2d 947, 153 P.2d 369 (1944).

¹³⁰ The court in *Bessinger* said that since the vendee was a tenant in possession "the sums received by [the selling purchaser] . . . from his vendee during the period of redemption constituted rents and profits received from a *tenant* in possession, and that therefore [he] . . . should have furnished plaintiff with a verified statement of the amount of the same." *Id.* at 949, 153 P.2d at 370.

¹³¹ See notes 98-99 *supra* and accompanying text.

¹³² See note 114 *supra* and accompanying text.

¹³³ The remedy which the vendee may have against the purchaser-vendor would probably

allowed to claim the proceeds of the sale as rents and profits of the land since such proceeds are not in fact rents and profits but are consideration for the sale.¹³⁴ Before the mortgagor is allowed to reap the benefits of the purchaser's bargain, he should be made to raise the redemption money, redeem, and then attempt to find a buyer for the property. Certainly nothing stops the mortgagor from contacting the purchaser's potential vendee and agreeing to sell him the property after he, the mortgagor, redeems.¹³⁵

In *Bessinger* the amounts of the installment payments may have been close to the reasonable rental value of the premises so that in allowing the mortgagor to redeem by paying the difference between the redemption price and the amount received by the purchaser the decision worked no injustice. However, calling *any* payments made pursuant to a purported sale rents and profits would work an injustice because the sale proceeds are not derived from the use of the land, but rather are consideration for the transfer of the title of the purchaser-vendor. The court should clarify whether *Bessinger* held that *any* contract payments are rents and profits or whether the *Bessinger* payments were called rents and profits simply because they approximated the reasonable rental value of the property. If the payments were contract payments as such and not mere rent, the case should be disapproved in that particular.

IV

TO WHOM THE REDEMPTION MONEY CAN BE PAID

Section 704 of the California Code of Civil Procedure states that the redemption payment may be made "to the purchaser or redemptioner, or for him, to the officer who made the sale."¹³⁶ The prospective redemp-

depend on the representations made to him regarding the title held by the purchaser-vendor, and the form of the deed which he was given. See generally 6 POWELL, REAL PROPERTY §§ 904-11 (1958); PROSSER, TORTS 697-753 (3d ed. 1964).

¹³⁴ "Rents" is usually defined as the consideration paid by a tenant to his landlord for the use and enjoyment of the land. See BURBY, REAL PROPERTY 230 (2d ed. 1954); 2 POWELL, REAL PROPERTY § 228 (1950); SMITH, REAL PROPERTY 335 (1956). "Profits" as used in this sense means "The benefit, advantage, or pecuniary gain accruing to the owner or occupant of land from its actual use; as in the familiar phrase 'rents, issues, and profits.'" BLACK, LAW DICTIONARY (4th ed. 1951). See also *People v. Gustafson*, 53 Cal. App. 2d 230, 239, 127 P.2d 627, 632 (1942).

¹³⁵ It has been pointed out that as a practical matter if the vendee of the purchaser is willing to accept the same or even slightly better terms from the mortgagor, the mortgagor could probably more readily obtain enough money to effect a redemption and then re-sell the property to the vendee. Hetland, *The California Land Contract*, 48 CALIF. L. REV. 729, 752 n.100 (1960).

¹³⁶ Compare MICH. STAT. ANN. § 27A.6062 (1962) which provides that payments may be made to the purchaser, his personal representatives, his assigns, the officer who made the sale, or the registrar in whose office the certificate of sale is recorded.

tioner must produce: a certified copy of the judgment, or a certified note of the record of the mortgage or other lien, under which he claims a right to redeem, a verified affidavit of any assignment necessary to establish his claim, and an affidavit showing the amount actually due on the lien.¹³⁷ These documents must be presented to the person from whom redemption is sought and must also be served on the sheriff along with a notice of redemption.¹³⁸ If the purchaser or prior redemptioner and the officer who made the sale cannot be found so as to pay them the redemption money, the court may order the money paid into the court. This will suffice as a redemption, although it does not strictly comply with the statute.¹³⁹

It is expressly provided that a tender of the redemption money is equivalent to payment,¹⁴⁰ and a valid tender of an adequate amount ends the purchaser's estate.¹⁴¹ The general rules applying to tender¹⁴² apply for the most part with equal effect to a tender for redemption purposes.¹⁴³ It is established, for example, that a tender conditioned on the prior receipt of a deed is not a valid tender,¹⁴⁴ and that the failure to object to the form of the tender when made waives any possible objections.¹⁴⁵ By refusing a tender the person to whom the tender is made does not lose his right to the money tendered, but he does lose any collateral benefits and interest.¹⁴⁶ When the purchaser or prior redemptioner refuses to disclose how much is due, courts have variously held that the tender is sufficient if it is either an approximate amount determined in good faith,¹⁴⁷ or a reasonable amount considering the purchase

¹³⁷ CAL. CODE CIV. PROC. § 705.

¹³⁸ The notice of redemption specified in CAL. CODE CIV. PROC. § 705 is one of the notices of redemption specified in CAL. CODE CIV. PROC. § 703. See *Salsbery v. Ritter*, 48 Cal. 2d 1, 306 P.2d 897 (1957) (correcting a misstatement in *Ritter v. Salsbery*, 142 Cal. App. 2d Supp. 847, 298 P.2d 166 (1956)).

¹³⁹ *Hutton v. Chapman*, 202 Cal. 513, 261 Pac. 708 (1927).

¹⁴⁰ CAL. CODE CIV. PROC. § 704.

¹⁴¹ *Leet v. Armbruster*, 143 Cal. 663, 77 Pac. 653 (1904) (ejectment action maintainable after tender); *Miller v. Lanktree*, 34 Cal. App. 293, 167 Pac. 195 (1917). *But see* *Call v. Thunderbird Mortgage Co.*, 58 Cal. 2d 542, 375 P.2d 169, 25 Cal. Rptr. 265 (1962), in which a valid tender was not given its proper effect by the court, apparently through oversight. The case is discussed in detail at notes 162-68 *infra* and accompanying text.

¹⁴² CAL. CIV. CODE §§ 1485-1515.

¹⁴³ *Sondel v. Arnold*, 2 Cal. 2d 87, 39 P.2d 793 (1934); *Leet v. Armbruster*, 143 Cal. 663, 77 Pac. 653 (1904); *Kofoed v. Gordon*, 122 Cal. 314, 54 Pac. 1115 (1898).

¹⁴⁴ *Youd v. German Sav. & Loan Soc'y*, 3 Cal. App. 706, 86 Pac. 991 (1906).

¹⁴⁵ *Lichty v. Whitney*, 80 Cal. App. 2d 696, 182 P.2d 582 (1947); *Petersen v. Gilbert*, 83 Cal. App. 542, 257 Pac. 140 (1927).

¹⁴⁶ *Leet v. Armbruster*, 143 Cal. 663, 77 Pac. 653 (1904); *Rose v. Hecht*, 94 Cal. App. 2d 662, 211 P.2d 347 (1949).

¹⁴⁷ *Petersen v. Gilbert*, 83 Cal. App. 542, 257 Pac. 140 (1927).

price, interest, and reasonable costs and expenses,¹⁴⁸ or even a mere offer to pay any amount due.¹⁴⁹ The statutes provide a summary judicial procedure for determining disputes concerning the adequacy of any amounts tendered.¹⁵⁰

Should a redemptioner fail to record a notice of redemption,¹⁵¹ it is possible that one seeking to redeem will not be aware of this unrecorded prior redemption and will seek to pay the person last of record—probably the person from whom the unrecorded redemptioner redeemed. In *Salsbery v. Ritter*¹⁵² it was concluded that the tender or payment to the last redemptioner of record, or to the sheriff for him, is a good redemption, unless there is actual notice of the prior redemption.¹⁵³ If there is actual notice, the redemption must be made from the unrecorded redemptioner despite his failure to record.¹⁵⁴ Should an innocent redemptioner actually pay the last redemptioner of record, there is the question of the alternatives available to the unrecorded redemptioner who has paid his money and is now without any interest in the land he redeemed. It seems clear that the first thing he should do is to proceed against the person to whom he paid his money—the person from whom he redeemed—for the return of his funds.¹⁵⁵ It seems unjust to hold that the unrecorded redemptioner loses any future right to redeem or to the benefit of his priority owing to his failure to record his first redemption.¹⁵⁶ If the failure to record requires a penalty, the possibility of losing the money paid upon the

¹⁴⁸ *Wilde v. M. J. Murphy, Inc.*, 67 Cal. App. 2d 421, 154 P.2d 470 (1944).

¹⁴⁹ *Roberts v. Henderson*, 127 Cal. App. 16, 14 P.2d 1038 (1932). The purchaser has no right to demand to know the capacity in which one seeks to redeem. Therefore, if one is qualified as both a successor in interest and as a creditor having a lien he need not reveal in which capacity he is attempting to redeem. *Lichty v. Whitney*, 80 Cal. App. 2d 696, 182 P.2d 582 (1947); *Miller v. Lanktree*, 34 Cal. App. 293, 167 Pac. 195 (1917).

¹⁵⁰ CAL. CODE CIV. PROC. § 702.

¹⁵¹ CAL. CODE CIV. PROC. § 703 provides that "Written notice of redemption must be given to the sheriff and a duplicate recorded with the recorder of the county . . ."

¹⁵² 48 Cal. 2d 1, 306 P.2d 897 (1957).

¹⁵³ The burden of showing the lack of actual notice is on the one who seeks to redeem. *Id.* at 14, 306 P.2d at 904.

¹⁵⁴ See note 37 *supra* and accompanying text.

¹⁵⁵ The courts would probably receive favorably an unjust enrichment theory and allow recovery since there has been a clear tendency to favor repayment where equitable in such situations, even where the legal right to such repayment is not clear. See, e.g., *Bateman v. Kellogg*, 59 Cal. App. 464, 211 Pac. 46 (1922). There is the danger, of course, that the person redeemed from will be unavailable, or, if available, will be unable to repay the funds. His acceptance of the second redemption, knowing that he had already been redeemed from, might indicate a dishonest motive.

¹⁵⁶ Such a result would allow subsequent redemptioners to redeem without paying the amount of the unrecorded redemptioner's senior lien. If the judgment debtor or a successor in interest did not redeem so as to allow the unsatisfied lien to reattach, the unrecorded redemptioner would be pre-empted, a result which the redemption statutes were designed to prevent.

first redemption and the inconvenience of having to make a second redemption should be sufficient. The unrecorded redemptioner should be allowed to re-redeem, retaining his priority, paying only those liens held by the current redemptioner which are prior to his own.¹⁵⁷

V

QUESTIONS OF STATUS

The effect of the foregoing transactions on the parties concerned is often a source of conflict. It is certain that a valid redemption by the judgment debtor or his successor in interest terminates the redemption period and the unsatisfied junior liens reattach to the property.¹⁵⁸ The same effect results if a cotenant redeems from the sale.¹⁵⁹ Until recently it appeared that if the judgment debtor or his successor in interest purchased the property at the foreclosure sale, the purchase would be regarded strictly as a purchase and not as a redemption. The California Supreme Court in *Corporation of America v. Eustace*¹⁶⁰ distinguished between the certificate of sale given to a purchaser and the certificate of redemption given to a person who redeems.¹⁶¹ It was stated that if the judgment debtor or his successor in interest purchased at the sale he had the same status as any other purchaser. Because of this, junior lienors

¹⁵⁷ The sheriff should normally recover the prior certificate of redemption from the person redeemed from, if the subsequent redemption is carried out through the sheriff. The sheriff should maintain current records of redemptions carried out through him so that the status of titles during the period of redemption can be ascertained even though a redemptioner fails to record his notice of redemption. This would serve to preclude an erroneous redemption, however, only if all redemptions were made through the sheriff, so as to allow his records to be accurately maintained. See note 138 *supra* and accompanying text.

¹⁵⁸ See note 28 *supra* and accompanying text.

¹⁵⁹ See notes 67-70 *supra* and accompanying text.

¹⁶⁰ 217 Cal. 102, 17 P.2d 723 (1932).

¹⁶¹ Briefly, the essential facts were these: The successor of the purchaser at a junior execution sale, at which was sold a portion of certain property, also purchased the entire property at the senior mortgagee's foreclosure sale. In the trial court the purchaser contended that the person who sought to redeem was not a proper redemptioner since her judgment was obtained after the sale. Since this issue was decided adversely to him, the purchaser urged on appeal that his purchase at the senior sale had the effect of a statutory redemption and terminated the effect of the sale so that no further redemptions could be made. The court said, "[T]here is nothing contained in [the redemption statutes] . . . that in any manner indicates that a purchase by the owner or his successor at execution or foreclosure sale amounts in effect to a statutory redemption, with the resulting statutory consequences The purchase or the acquirement of the certificate of purchase, by one who has both the right to purchase and redeem, whether he be the debtor or a junior lienholder, is not a redemption and is not attended with the legal consequences of a redemption." 217 Cal. at 107, 17 P.2d at 726. The quoted material is probably dicta in that both parties treated the successor in interest as a purchaser in the trial court and their position could not be altered on appeal.

had the right to redeem within the period of redemption and would lose their liens if they did not exercise this right.

This view was not challenged on the appellate level until the recent case of *Call v. Thunderbird Mortgage Co.*¹⁶² The court there stated that the purchase at a foreclosure sale by a successor in interest of the judgment debtor had the effect of a redemption; junior liens reattached and no further redemptions were possible.¹⁶³ Although the *Corporation of America* case was argued in the briefs,¹⁶⁴ it was not mentioned in the *Call* opinion.¹⁶⁵ Since *Call* may have been dicta it is not certain that it supersedes the earlier case. If *Call* is not dicta, the two cases appear irreconcilable since the factual differences seem tenuous.¹⁶⁶

¹⁶² 58 Cal. 2d 542, 375 P.2d 169, 25 Cal. Rptr. 265 (1962).

¹⁶³ The facts in essence were these: The defendant was the successor in interest of the judgment debtor by virtue of a deed which conveyed the property subject to three liens. The trial court had held that the defendant was not a successor in interest because the deed was obtained prior to the foreclosure sale. The supreme court reversed, expressly overruling *Lawler v. Gleason*, 130 Cal. App. 2d 390, 279 P.2d 70 (1955), the case upon which the lower court's decision was based. See note 50 *supra* and accompanying text. The second lien was foreclosed and a sale held at which the defendant (the successor in interest) purchased. The plaintiff, who owned the third lien, which had previously been foreclosed, sold and bought in under his lien. At this point the defendant, as successor in interest, tendered the amount necessary to redeem from the plaintiff's sale. This tender was refused, the sheriff saying that the defendant was not a successor in interest on the authority of *Lawler v. Gleason*, *supra*. The sheriff then allowed the plaintiff to redeem from the defendant's purchase at the second lien sale. The defendant then got a quitclaim deed from the judgment debtor which satisfied the sheriff and redeemed the plaintiff's interest in the property.

The case should have ended upon the defendant's tender to the plaintiff after the plaintiff purchased at his own sale. The supreme court did not specifically let the case rest on this basis, however, and treated as essential the defendant's status as a successor in interest who was, therefore, qualified to redeem from the plaintiff's sale. Since the defendant was finally allowed by the sheriff to redeem the correct result was reached and the supreme court was satisfied. The court added that the plaintiff had no right to redeem from the defendant's purchase since the defendant was a successor in interest whose purchase had the effect of a redemption which terminated the effect of the sale. The discussion of the effect of the purchase by the defendant as a successor in interest may be regarded by future courts as dicta since it was not essential to the decision. The supreme court, however, may have thought that it was essential to the result, and may be inclined to treat it as such in the future.

The early case of *McCarty v. Christie*, 13 Cal. 79 (1859), apparently held that the purchase by or assignment to the mortgagor of the certificate of sale had the effect of a redemption and, therefore, of terminating the effect of the sale. This case was not discussed by the court in either *Corporation of America* or in *Call*, but would seem to support the *Call* result.

¹⁶⁴ See, e.g., Brief of Appellant, pp. 29-30; Brief of Respondent, pp. 11, 13; Appellant's Answer to Respondent's Petition for Hearing by Supreme Court, pp. 4-5.

¹⁶⁵ The supreme court adopted, with minor modifications, the opinion of the district court of appeal which heard the case.

¹⁶⁶ For example, the purchaser in *Corporation of America* held under a sheriff's deed obtained pursuant to a junior sale, while the purchaser in *Call* obtained his deed directly from the judgment debtor.

Theoretically, it is immaterial which result prevails. Junior lienors are protected in either case, either by being entitled to redeem from the purchaser under the *Corporation of America* result, or by reattaching under the *Call* analysis. Serious practical problems are created by the uncertainty, however. In reliance on the *Corporation of America* case many junior lienors may have considered their liens lost when they failed to redeem following a purchase by the judgment debtor or his successor in interest at a senior foreclosure sale. Under the *Call* theory, however, there never was a right to redeem following such a purchase and the unsatisfied liens reattached to the property. Unless barred by the statute of limitations,¹⁶⁷ such reattached liens may today encumber property. The uncertainty in the law in this area clouds the titles of many persons who as judgment debtors or their successors in interest purchased their own land at a foreclosure sale. The titles of persons claiming through such purchasers are similarly clouded.¹⁶⁸ The court should resolve this inconsistency at its earliest opportunity. Apparently the next move is up to the holders of the reattached junior liens.

Another problem follows in the wake of *Call v. Thunderbird Mortgage Co.*: what effect is to be given to a purchase at a foreclosure sale by one who is also a creditor having a lien on the property?¹⁶⁹ If the *Call* result obtains, it can be argued that a purchase by one who is qualified as a redemptioner had the effect of a redemption, and other redemptioners must therefore redeem within the prescribed sixty days or be out. The language of California Code of Civil Procedure Section 703, however, indicates that the sixty day limitation would commence only after a *redemption* by a redemptioner, rather than after a purchase by a redemptioner.¹⁷⁰ This conclusion is reinforced by the other redemption statutes which actually contemplate a purchase by a creditor, and provide for

¹⁶⁷ The four-year statute of limitations, CAL. CODE CIV. PROC. § 337, commences to run after the underlying note becomes due. Assume that in 1950 a fifteen-year note was given secured by a second mortgage; the senior mortgage was foreclosed prior to the maturing of the note secured by the second mortgage; a sale was held under the senior foreclosure at which the mortgagor or a successor in interest purchased; the period of redemption ran without any redemptions. Based on these facts under the *Call* result the lien of the junior mortgage reattached upon the purchase by the mortgagor or the successor in interest, and the lien of that mortgage remains good until 1969 (fifteen years from the execution of the note, 1950, plus the four-year statute of limitations on the action to foreclosure the lien after default).

¹⁶⁸ See HETLAND, SYLLABUS ON CALIFORNIA REAL PROPERTY SECURITY TRANSACTIONS, NINTH ANNUAL SUMMER PROGRAM FOR CALIFORNIA LAWYERS 22 (1963).

¹⁶⁹ It will be recalled that a redemption by such a redemptioner shortens the period within which other redemptioners can redeem to sixty days. CAL. CODE CIV. PROC. § 703.

¹⁷⁰ CAL. CODE CIV. PROC. § 703 states, "If property be so *redeemed* by a redemptioner, another redemptioner may, within sixty days after the last *redemption*, again *redeem* it from the last redemptioner" [Emphasis added.]

the payment of the lien held by such creditor-purchaser by subsequent redemptioners and redeemers.¹⁷¹

CONCLUSION

The facts of redemption cases are often quite complex. More than once this complexity has been preceded by a misapplication of the redemption law by a sheriff or by a judge. The fact situations must be dealt with on a step by step basis. That is, after each transaction the law must be applied and the status of each person interested in the property determined. In dealing with the myriad of problems which arise under the redemption statutes, the California courts should bear in mind the purposes of the statutory rights of redemption: to protect persons who bought subject to the mortgage; to protect creditors who are in danger of losing their security; to encourage bidders at the foreclosure sale to bid a fair price for the property; to allow the mortgagor the maximum time to regain his property. The objectionable features of redemption should likewise be remembered and their effect minimized: possible irresponsibility by mortgagors who know that they can redeem their property even if they default in their original payments; speculation by those entitled to redeem; and, most importantly, the defeasibility of the title obtained by the purchaser and the length of time which elapses before the title is finally settled.

The statutory right of redemption in California is not esoteric and is quite workable. To keep it from becoming otherwise, those dealing with redemption problems must make certain that the proper effect is given to the various transactions, and that the effect given is just.

Darryl A. Hart

¹⁷¹ CAL. CODE CIV. PROC. § 702.