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Irving H. Flamm

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EXTENDING THE USE OF CHANCERY POWERS TO END DEADLOCKS IN REAL ESTATE BOND FORECLOSURES

IRVING H. FLAMM[1]

THE REAL estate bond is of comparatively recent origin. Until about twenty years ago, the individual mortgage was the customary security used to finance real estate. Then, observing the popularity of railroad and industrial mortgage bonds, underwriters conceived the idea that the market for real estate mortgages could be greatly improved by dividing the mortgage into small units. The trust deeds used in connection with these real estate bond issues were also patterned after those used in the large railroad and industrial mortgages. These real estate bond trust deeds are now passing through their first real test, and we find them wanting, principally because the complications involved in the foreclosure of a fifty thousand dollar issue are almost as great as those which arise in foreclosing a ten million dollar railroad mortgage. As a result, the percentage of expense in foreclosing the small bond issues is disproportionately high, and this fact has furnished the basis for much criticism.

Nor is the element of expense the only evil in the present foreclosure situation. The element of delay is even more destructive and wasteful. The operation by a receiver or committee of an apartment building, contain-

[1] Member of Illinois Bar; alumnus of Chicago-Kent College of Law.

ing, say, twelve or eighteen apartments, can seldom produce the same results as will the operation of the same property by an interested owner, whose pocketbook is directly affected by each of the hundreds of different transactions made annually in the course of the operation of that property. Individual owner management, or at least owner supervision, is essential if one is to get the most out of these properties, particularly the smaller units. Yet, in most of the bond foreclosures which are to be carried through to a finish, because of the legal obstacles existing under the present procedure, the gap between the default and the expiration of the period of redemption will range, frequently, from three years upward. The loss of net income during the interim must necessarily be great even if the property is operated by a reasonably efficient and honest receiver or committee.

An examination of the bond foreclosures filed in 1930 and 1931 will disclose that only a small percentage of these have been brought to sale. Many of them will not and cannot be brought to sale under the present method of foreclosure for many years to come. After the sale, another fifteen months must elapse before the title can be put in merchantable condition. In the interim the property is either insufficiently maintained or the net income reduced, or both.

The obstacles which must now be overcome before a sale under decree can be had in a foreclosure involving scattered bonds are apparent to those lawyers who have been engaged in that class of work. The bonds in a fifty thousand dollar issue may be scattered among three hundred bondholders of all nationalities, some unable to understand English, and most of them unable to comprehend their legal position. Many of the bondholders are unknown and cannot be located, and others are suspicious and distrustful of anyone who approaches them for a discussion on the subject. Unfavorable publicity for some bondholders' committees and bankers has aggravated this condition. Some bonds have come into the hands of individuals who are merely interested in stirring

up a nuisance value for themselves. All of these conditions apply in the average case, and in the face of these, it is well nigh impossible to expect unanimity of action among the bondholders for any purpose.

When a default occurs in a real estate mortgage, the ultimate object of the mortgagee (except perhaps in those exceptional cases in which the mortgagor has independent financial strength) is to enforce the lien of his mortgage by selling the property for the highest price obtainable in order to satisfy his debt out of the proceeds. In theory, a judicial sale in such a foreclosure suit contemplates a free sale in the open market to the highest bidder. In practice, we know that this procedure is a sham, an idle gesture, a mere legal formality. There are no free buyers at such judicial sales. In fact, there is no free seller, for the title offered by the master is a qualified title subject to redemption rights. And so, in practice, we find that in nearly all of such cases, the complainant mortgagee, or his nominee, is the sole bidder, and his bid is usually an arbitrary amount, having little relation to the value of the property. It is expediently based on the amount of his mortgage less such deficiency as will warrant the collection of rents during the redemption period. No money passes at these sales. The complainant mortgagee, being both the buyer and also the person entitled to the proceeds of the sale, is able to use his mortgage in lieu of cash, and the transaction is completed with little difficulty.

Where, however, three hundred scattered individuals own the mortgage among them, the situation becomes extremely complicated. For, if no disinterested bidder offers anything like a fair price at a sale, and if the bondholders do not all co-operate in the foreclosure by bidding in the property for themselves and utilizing their bonds in payment, no sale can be had. That is the usual situation today. Where the house of issue is of high caliber and is still in business, and enjoying the good will of the bondholders, it takes an active part in rounding up these bondholders and encouraging deposits

of bonds with a committee that is given the right to use them for bidding at the sale. Even in these exceptional cases it is very difficult to get sufficient co-operation to carry through the sale. In any event, in the great majority of cases, we have a sort of deadlock, a situation where the trustee who has commenced the foreclosure as a representative of the bondholders, cannot proceed to a sale, because there is no one who will bid in the property, and he, the trustee, is, presumably, unable to do so on behalf of the bondholders. Is a court of equity without power to meet such a situation?

If a committee is functioning, and has, say, eighty per cent of the bonds under its control, it must, if it should decide to bid, produce a proportionate share of the bid in cash for distribution among the other twenty per cent in addition to the foreclosure expenses. Who is to advance this money? Bondholders will not make such advances. The committee often endeavors to raise this money through a new first mortgage, but here it runs into another snag. It cannot effect a merchantable first mortgage lien even if it should bid in at the master's sale, because a title so acquired is subject to redemption rights. There is still another perplexing problem. What amount shall it bid for the property? If it bids an amount somewhere close to the face of the mortgage, it must produce for the minority dissenters a large amount of cash, and these dissenters would then be faring better than the bondholders who deposited their bonds under the advice of the committee. If, on the other hand, it is to bid an extremely low amount in order to reduce the cash requirement and to penalize the dissenters, the committee is faced with the possibility of a redemption at a low price. These perplexing problems are a source of great annoyance to committees and trustees and they are in no small way responsible for the misunderstandings which exist today.

In many of these cases committees are attempting to solve the problem by buying up the outstanding redemption rights and then, pursuant to a reorganization plan,

bidding in the property for a small amount, thereby virtually squeezing out non-depositing bondholders. This is not feasible in the average case, because of the difficulty in raising the required finances even upon a valid new first mortgage lien. Moreover, there is a growing tendency by the courts to refuse to confirm sales at extremely inadequate prices, particularly where the dissenting bondholders raise objections to such confirmation. To meet these difficulties many forms of legislation have been proposed, but because of constitutional restrictions the proposed legislation would be futile. All in all, the complexities of the situation (now further complicated by the new Federal Securities Act) are such that many, if not most, of the pending bond foreclosures will continue to hang on the calendar for years to come, unless some bold explorations in the field of equity shall prove fruitful. It is the writer's purpose in this article to suggest a solution from that approach.

A mortgagee who owns an entire defaulted mortgage against a mortgagor who is insolvent will, if he uses ordinary prudence and judgment, attempt to get the benefit of his security with the least expense and delay. If upon investigation he finds that the aggregate expense of foreclosing, say, a ten thousand dollar mortgage will exceed one thousand dollars, and that approximately two years must intervene before he can acquire good title, he will, in such case, be wise to offer the mortgagor a like settlement in cash, or an equivalent participating interest in the property, and thereby acquire control of the title by voluntary negotiation. If that is the prudent course for an individual mortgagee, why should not a trustee for various shareholders in a mortgage try to adopt the same course? Such an arrangement, moreover, assures co-operation by the equity owner who is given an opportunity to salvage part of his investment. Instead of destructive receiverships and alienation of tenants, the management can now be continued in a harmonious and friendly spirit.

This principle of adjustment by concession to junior interests is not new. It is common to the many railroad and industrial reorganizations which have been worked out after mortgage defaults. The idea of buying up redemption rights is gaining favor among mortgage bankers and committees. The difficulties in financing have heretofore been pointed out. But as applied to a real estate bond issue, the proposal here made is that the trustee under the trust deed acquire such title by negotiations with the equity owner and junior interests pursuant to the court's instructions but without the aid of the judicial sale which now accompanies such transactions. Obviously, if a trustee can acquire title promptly for the bondholders by giving up a small participating interest valued at less than the aggregate cost of foreclosure, he will be serving the *cestui* well. In many cases this will prove to be the only solution of the problem, since foreclosure by judicial sale requires funds for expenses and for dissenting or unknown bondholders which are not presently available and may never be available.

In the face of conflicting views among lawyers, it is not surprising that trustees are timid in voluntarily conducting negotiations to acquire titles, even when convinced that such transactions are clearly beneficial to the estates.[2] And so we observe a strange phenomenon, that of a trustee going through all kinds of useless legal motions and a prolonged imaginary contest in which the real purpose is to acquire a title which he might peacefully get at less cost and effort. It does not seem plausible to say that a court of equity is helpless to prevent such wasted motion and the resultant loss to the estate. Let us, therefore, assume that a trustee in a representative capacity files a bill to foreclose, (or, in a pending proceeding, a supplemental bill) setting up the usual al-

[2] See 27 Ill. L. Rev. 849, which contains an interesting article embracing the suggestion that Trustees acquire title for all the bondholders at the foreclosure sale. See also Nay Aug Lumber Co. v. Scranton Trust Co., 240 Pa. 500, approving such procedure, and Equitable Trust Co. v. U. S. Oil and Refining Co., 35 F. (2d) 508, which criticizes the Pennsylvania opinion.

legations with respect to the debt, the security, the default, etc., and then adds in substance the following allegations:

1. that the mortgagor is insolvent;

2. that the equity owner (including junior interests) has offered to convey clear title to the premises in consideration either (at the option of the Trustee) of a cash payment of ten per cent of the face of the mortgage, or a ten per cent participating interest in the property;

3. that the aggregate cost of carrying through such foreclosure and the losses resulting from necessary delays therein will exceed such amount;

4. that there are numerous circumstances and obstacles which will prevent an expeditious foreclosure, viz.:

5. that the ownership of the mortgage is scattered among numerous bondholders, many of whom are unknown and cannot be located, and that it is therefore impossible to obtain unanimity of action or consent by them;

6. that it is very unlikely that anyone will make a reasonable bid at a foreclosure sale;

7. that in any event no funds are available in the estate to carry on the foreclosure proceedings;

8. that great delay and irreparable loss to the estate will result from a failure to enter into such transaction with the equity owner;

9. that if a sale of the real estate should be deemed necessary or advisable, or be demanded by any bondholders, such sale could, in any event, be had under the court's direction to much better advantage after acquiring such title;

10. that a majority of the bondholders, through a committee, have requested that title be acquired in their behalf upon the terms indicated;

11. a prayer for instructions by the court as to whether to proceed with the foreclosure in the usual man-

ner, or to acquire title in the manner above indicated, and thereafter offer the property for sale under the direction of the court.[3]

It would seem reasonable that under the above allegations, and even if the tenth allegation could not be presented, a court of equity in order to conserve the estate would have the power to instruct the trustee to acquire title by voluntary purchase and hold and manage the property subject to the court's orders, until a sale is ordered.

Upon the filing of such petition, the court could also enter an order giving all bondholders, or other parties interested, who desire to do so, leave to intervene or file objections to the proposed purchase of the title. This order may be based on a principle somewhat akin to the usual chancery order, fixing a date in which claims or objections to claims may be filed. Or, in the alternative, bondholders might be joined as defendants,[4] and if unknown, publication had against them as unknown owners. If any did appear to object to the trustee's proposal, it is difficult to conceive of any meritorious argument in support of such objection. In any event, the court, if it finds the allegations of the bill to be true, (and in most bond issue foreclosures in Chicago these allegations could be used) it would seem that the chancellor has the power and ought to issue instructions that the trustee acquire title in the manner suggested. In the decree the powers and duties of the trustee, as well as the method of management, whether by the trustee or by the former equity owner, or by some reputable management firm, could be enumerated, and the court would retain jurisdiction of the matter during the life of the trust. Any *cestui que trust* might thereafter make demand for the sale of the property. Upon such demand being made, the court could

[3] See footnotes 10 and 19.

[4] Secs. 24 and 44 of the new Illinois Civil Practice Act, relating respectively to joinder of defendants and joinder of actions, will furnish greater opportunities to clear away in one proceeding the confusion created by the divergent objectives of the various bondholders.

thereupon order the trustee to obtain bids for the property or carry on negotiations for its sale, with the same advantages that are had by an owner having a merchantable title and offering it for sale in the open market. Incidentally, these sales would ordinarily take place long before the masters would hold them under the present foreclosure system.

The following objections are raised to the proposal: First, such procedure is not contemplated by the trust deed and would constitute a breaking in upon the trust by the court; second, the dissenting bondholders have a contractual right to have their share of the security paid in cash and a judicial sale must be had to fix their share; third, such procedure deprives the bondholders of the right to enforce the debt against the maker. These objections are discussed in the order just stated.

The trust created by a bond issue trust deed is an express trust. Who are the *cestuis que trust*? At first glance one thinks of the bondholders. Our Supreme Court, however, has repeatedly indicated that the trustee holds title not only for the holders of the mortgage bonds, but for every person who has an interest in the property.[5] Consequently, the trustee owes a duty to the equity owner and to the junior lienors, as well as to all bondholders, to conserve the trust property. In the face of such duty, it is clear that a trustee ought to take such steps as will benefit the estate. But, it is contended, the trustee can only take those steps which are authorized by the trust indenture. The usual trust deed authorizes the trustee, upon default, to take possession of the property and operate it until the default is cured, or to foreclose and sell the property under a decree and distribute the proceeds among those entitled thereto. No express authority is conferred upon the trustee to negotiate for title for the bondholders, hence the assumption that the trustee has no such authority. Pomeroy[6] has stated a familiar principle as follows:

[5] Gray v. Robertson, 174 Ill. 242; Williamson v. Stone, 128 Ill. 129.

[6] 3 Pomeroy's Equity Jurisprudence, sec. 1062.

Trustees in carrying the trust into execution are not confined to the very letter of the provisions. They have authority to adopt measures and to do acts which, though not specified in the instrument, are implied in its general direction, and are reasonable and proper means for making them effectual.

The broad purpose of the trust deed is to realize the utmost from the security for distribution among the parties in interest. If the most practical way of accomplishing this result is by a procedure not specifically outlined in the trust deed then why should not a trustee be empowered to adopt such procedure? Assuming the trustee were offered the redemption rights gratis by an insolvent maker, would he still be obliged to "foreclose" in the same manner?

The term *foreclosure* promptly brings to mind an elaborate judicial proceeding which results in a decree and a sale. However, there is substantial authority for the proposition that the term *foreclosure* as used in our trust deed implies any act which deprives the mortgagor and his assigns of their right to redeem.[7] This term has been held to embrace the voluntary act of the mortgagee in acquiring title.[8]

It may be added that while the usual form of trust deed confers no specific authority upon a trustee to acquire title by voluntary negotiation, even though he may find such step beneficial, and there is therefore some justification for the trustee's refusal to undertake such responsibility, yet there is nothing in the average trust deed which prohibits such action. If the trustee's right to "foreclose" is to be construed in the manner heretofore suggested, it would seem that he would have the power to acquire such title by purchase. But as a precautionary measure,[9]

[7] See 41 C. J. 830, sec. 1003.

[8] Puffer v. Clark, 7 Allen (Mass.) 80, 85; Lilly v. Palmer, 51 Ill. 331.

[9] In Quick, Exec. v. Fisher, 9 N. J. Eq. 802, it was held that although the trustee may have no power to change the character of the trust fund, if such change be necessary, it should be made only with the sanction of a court of equity.

if he presents the facts to a court of equity on a petition for instructions, he is relieved of his responsibility, when the court upon a hearing, finds the transaction beneficial to the estate and instructs him to enter into it. Certainly the court has power, under its inherent powers over trusts, to instruct the trustee to adopt a course which would best serve the estate and all beneficiaries.[10] Indeed there is even room for the thought that the trustee, knowing that he could benefit the estate by such procedure, may be held to be derelict in his duties in failing to call it to the court's attention.[11] A trustee's duty is to comply with the trust instrument in its true spirit and meaning, and he should, for that purpose, adopt such measures and do such acts as are implied in its general direction. It has often been held that a court of equity may even alter the trust scheme, upon application of the trustee, where strict adherence prevents the carrying out of the creator's wishes, and the alteration will aid its accomplishment.[12]

In *Curtis* v. *Brown,*[13] where a similar question arose, although under different circumstances, the chancellor ordered a distribution of the trust property in a manner different from that provided under the trust instrument, holding that when unforseen exigencies arise, the court should place itself in the position of the creator of the trust, and do as he would have desired, if he had anticipated the existing circumstances. The court in refusing to follow English precedents, pointed out that in England, if a similar emergency arises warranting relief against the provisions of a trust, Parliament is vested with the power to afford such relief; that under our

[10] Craft v. I. D. & W. Ry. Co., 166 Ill. 580; Strawn et al. Exrs. v. Trustees of the Jacksonville Female Academy et al., 240 Ill. 111; Longwirth v. Riggs, 123 Ill. 258.

[11] Cassidy v. Cook, 99 Ill. 385.

[12] Curtis v. Brown, 29 Ill. 201; Gavin v. Curtin, 171 Ill. 640; Longwirth v. Riggs, 123 Ill. 258; Packard v. Ill. T. & S. Bank, 261 Ill. 450; Denegre v. Walker, 214 Ill. 113; Marsh v. Reed, 184 Ill. 263; New Jersey National Bank and Trust Co. v. The Lincoln Mortgage and Title Guaranty Co., 105 N. J. Eq. 557.

[13] 29 Ill. 201.

constitution the legislature possesses no such power and since no other tribunal has such power, courts of chancery must exercise it, it being their peculiar province to afford relief in cases of necessity where other tribunals lack such power. The court here made the following observations:

Can it be said that the beneficiary of an estate which would bring in the market one hundred thousand dollars, should perish in the street from want, or be sent to the poor-house for support, or that the estate should be totally lost, because there is no power in the courts to relieve against the provisions of the instrument creating this trust? Exigencies often arise not contemplated by the party creating the trust, and which, had they been anticipated, would undoubtedly have been provided for, where the aid of the court of chancery must be invoked to grant relief imperatively required; and in such cases the court must, as far as may be, occupy the place of the party creating the trust, and do with the fund what he would have dictated had he anticipated the emergency, ... Trust estates are peculiarly under the charge of and within the jurisdiction of the court of chancery. The most familiar instances in which the court interferes and sets aside some of the express terms of the deed creating the trust, is in the removal of the trustee for misconduct and the appointment of another in his stead. But this is as much a violation of the terms of the settlement, as is a decree to sell the estate and re-invest it, or to apply the proceeds to the preservation of the estate, or the relief of the *cestui que trust* from pinching want. From very necessity a power must exist somewhere in the community to grant relief in such cases of absolute necessity, and under our system of jurisprudence, that power is vested in the court of chancery. This power is liable to be abused or imprudently exercised, no doubt, and so may every power vested in the courts or other branches of the government. The liability to the abuse or misuse of power can never prove its non-existence, else all powers of government would be at once annihilated.[14]

After all, if the most practical goal for a mortgagee is the acquisition of clear title, and then after getting it to

[14] 29 Ill. 230.

resell it, why should not equity be empowered to decree such procedure for the trustee by the shortest and least expensive route, and often the only route? It might well be said that the trust deed is silent as to the procedure to be followed under the contingencies that have now arisen in most bond issue foreclosures. The trust indenture provides for a foreclosure and judicial sale, but the machinery for carrying out this provision is not set up. It is silent as to the procedure to be adopted if, after default, no funds are available to carry on a foreclosure, or if the bondholders refuse to co-operate with each other or with the trustee, or if the market is abnormal and no buyers can be obtained at a fair price. Nor can it be said that the trust deed anticipates a situation where the mortgagor is insolvent and the equity owner offers to surrender the security on a basis that will serve better to conserve the estate than foreclosure by judicial sale.

The contention that dissenting bondholders have a contractual right to have their share of the security paid in cash can be urged only in so far as the trust deed may provide a process for raising such cash. Since the practical machinery for carrying out a judicial sale is not set up in the trust deed, in the absence of co-operation by bondholders and the existence of funds to conduct a foreclosure, equity must step in to aid the helpless trustee. In such a situation, there is involved the relative equities of two classes, the majority bondholders as represented by the committee and the dissenting or indifferent minority. The danger of substantial property loss to the majority should be of greater concern to a court of equity than the mere technical legal rights of the minority. It may be noted here that when the positions are reversed the courts ignore, and properly so, the technical legal rights of the majority in order to protect the property interest of the minority. Instances of these are (1) upset price provisions in decrees and (2) refusal to confirm sales because of inadequacy of the bid, although both of these practices may be said to violate the legal rights of the majority under the provisions of the trust inden-

ture. The assumption by the court in a foreclosure suit of the power to pass upon the fairness of a reorganization plan may be regarded as another encroachment upon technical rights created under the trust deed. In view of these departures, surely a chancellor should attach greater importance to the substantial equities of the majority than to the frivolous technical contentions of the dissenters.

But a more effective answer to this alleged right of the dissenting bondholder, is that under the procedure here proposed, the right of such dissenting bondholders to force a sale which will fix their share, need not be cut off. On the contrary, not only could such dissenters bring about a sale, but they could, once a title is acquired by a trustee, petition for the sale of a *merchantable* title to the property in the open market, instead of going through the mere subterfuge of a pretended sale as is now the case.

One who uses common sense and ordinary business prudence will not use a roundabout, cumbersome, and expensive way of getting something he needs when he can accomplish his object in a simple way at much less cost. The purposes of an equity court would indeed be frustrated if it could not be called upon to conserve trust property merely because the specific method required is slightly different from that outlined in the trust indenture. In giving instructions to the trustee to acquire title, when such course is beneficial to the estate, the court would be fulfilling the intention of all the beneficiaries and the creators of the trust. True, the bondholders may not have anticipated the acquisition of title. Even so the court has not insisted upon the title being indefinitely held for the bondholders. It has merely ordered the acquisition of title in order that great expense and delay may be avoided, and that such title be put up for sale to the best advantage, unhampered by defects. By such action the court is merely aiding in the accomplishment of the purposes of the trust in the most practical manner.

After acquiring title, if pressure for a sale by a persistent minority should continue, the court could at any time order a sale held or invite bids, and if the highest bid should then be grossly inadequate, the court, upon petition of the majority in interest, could refuse to accept it, but it might then, as a condition, give to the dissenters so desiring, certificates of indebtedness based on their pro rata share of such rejected bid. Thus, each faction would be getting what it most desires, a share of the security to the one group and a share of the depressed market value of the security to the other. Terms and conditions of payment of the certificates of indebtedness could be set forth in the court's order, depending on the existing circumstances. Delays in payment, if any were required, would work no greater hardship than in any other creditors' proceeding where the disposition of the *res* is delayed for the purpose of conserving the estate. In creditors' suits against corporations, our Federal courts have recognized that judicial sales are very often an evil resulting in substantial injustice either to the majority or to the minority. In the Phipps case,[15] the court commenting on such situation said:

> . . . judicial sales are futile to extract the vice of a failure by a plan of reorganization and decree to secure to creditors their equitable shares of the beneficial interests in the reorganized corporations, and that fact is in itself a persuasive argument that a plan of reorganization and decree which does adjudge and secure or offer to the creditors their just and fair shares of the benefits of the reorganized company, either in its stocks, bonds, or other securities, is just, fair, and impervious to the attacks of such creditors, although no judicial sale is adjudged thereby or made thereunder.

The court then proceeds to regard itself as a trustee holding the trust estate for the benefit of all creditors, and, with respect to delay in payment, it said:

> Nor was it indispensable to such a just result, or to a lawful decree, that the interest or share of any of the *cestuis que trust*

[15] Phipps v. R. I. & P. Ry. Co., 284 F. 945.

should be secured or paid to him or it in cash. It was within the power and the judicial discretion of the court to adjudge and secure that interest or share to him or it in the stock, bonds, or other securities of the reorganized company.[16]

The foregoing case involved unsecured claims. But does not a general creditor, in his relation to other general creditors, stand in the same position as a lien creditor in his relation to other lien creditors of equal rank? On that basis the principles applied in the above case might readily be utilized in mortgage foreclosure suits.

The other objection suggested to this procedure is that a bondholder is deprived of his contractual right to pursue the maker of the bonds. In view of the court's finding that the maker is insolvent, it would seem that the rights of the majority should not be subordinated to such frivolous contentions of the minority. The legal right to collect against an insolvent maker, particularly if it be a building corporation, ought not to be permitted to tie up a trust estate in which the majority of the beneficiaries are willing to ignore such right. Individuals may, of course, later become solvent; but courts of equity are even now inclined to relieve mortgagors from the burden of deficiencies, and thus refuse to confirm sales where deficiencies are sought.[17] In any event, if it be held in any given case that there is merit to the demand for a deficiency, the court may, upon such demand, refrain from including any restraining order in its decree which will bar a dissenter's individual right to pursue the maker for such amount as he may be entitled to recover. This would preserve his right to the difference between his share of the debt and the value of his proportionate interest in the property acquired by the trustee. The objection to this is that it may prevent co-operation of some of those equity owners who are also makers of the bonds.

It should be noted that the proposal here made, contemplates the action of the court upon a voluntary petition of

[16] Citing Northern Pacific R. Co. v. Boyd, 228 U. S. 482, 508.
[17] Suring State Bank v. Giese, 246 N. W. 556 (Wis. 1933).

the trustee for instructions, after the latter has investigated the facts and presented them to the court in the foreclosure petition, or in a supplemental petition. The principle underlying such procedure has the stamp of approval of at least one court in a case recently decided.[18] While this suggestion would not be directly applicable in the cases of racketeering trustees or committees, who, for selfish reasons, have no desire promptly to work out an ultimate settlement or reorganization of the property, yet the court could exercise coercive measures against these by ordering their removal or, in appropriate cases, by withholding aid through its power of appointing receivers. In all foreclosure suits where motion for the appointment of a receiver is made, if it develops upon a hearing of the motion that the trustee can benefit the estate by acquiring the redemption rights without judicial decree and sale, and if it shall further appear that the trustee or the committee has refused to take such course without good cause, then the chancellor should deny the motion for a receiver. In such case the complainant mortgagee is, in effect, saying, "It being my privilege to do so under the trust deed, I choose to acquire such redemption rights through a long drawn out and expensive proceeding rather than deal with the equity owners at a saving to the estate." In response a chancellor might well say, "Perhaps I cannot stop you from foreclosing, but you cannot, under these conditions, induce me to bring into play my extraordinary power of appointing a receiver to help you carry out your malicious purpose." Such an attitude by the courts would undoubtedly frustrate those individuals who have injected themselves into the picture mainly to serve their own ends.

The procedure outlined here, if found to be as practicable as the writer believes it to be, would perform a number of useful social and economic functions.

[18] New Jersey Nat. Bank, etc. v. Lincoln Mortgage, etc. Co., 105 N. J. Eq. 557.

First, it would tend to straighten out the many en tanglements in which real estate titles are now involved. In doing so, real estate as a commodity would be distinctly benefited, and these benefits would inure to a large class now interested in the ownership of real estate or real estate securities. In this connection, it is well to bear in mind that under the procedure here proposed, registration under the new Federal Securities Act should be unnecessary, since all the acts of the trustee would be based upon judicial orders.

Second, it would give a new lease on life to equity owners, who, under the proposed plan, would be able to salvage something out of the wreckage created through no fault on their part. This salvage, often the remains of a lifetime of savings, would be effected not at the expense of the bondholders, but rather at the expense of outside interests, who frequently profit most by prolonging the period of foreclosure, or by ultimately perpetuating themselves in control of properties through liquidating or voting trusts, which they have subtly arranged to suit themselves. Certainly, control by the court over the trust until a sale is finally had under its direction is more protective of the bondholders' interest.

Third, this proposal, if adopted, would be extremely helpful to the Bar as a whole. It would remove the causes for much of the mud slinging now directed at the legal profession, including the judiciary. While the lawyers may not be responsible for the evils now existing, they owe it as a public duty to exert their best efforts to cure them.[19]

[19] An opinion rendered after this article was written, in Straus v. Chicago Title and Trust Co. by the Appellate Court of Illinois, 1st district, (case No. 36806), on Dec. 13, 1933 is additional authority for some of the views herein contained.