Strict Foreclosure of Real Estate Mortgages in Illinois

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At present, in the majority of the states of the Union, no method exists, either at law or in equity, by which the mortgagee can be adjudged the absolute owner of the mortgaged premises; hence, strict foreclosure as known at common law is no longer possible. The legislatures of many states have provided the method by which mortgages shall be foreclosed; and where the statutes specifically set forth the method, each act done in pursuance thereto must rest upon statutory authorization. Thus, Section 8172 of the Code of Iowa provides that "when a mortgage or deed of trust is foreclosed, the court shall render judgment for the entire amount found to be due, and must direct the mortgaged property . . . to be sold." According to the American & English Encyclopaedia of Law, strict foreclosure is usual in only two of the states—New Hampshire and Vermont, but it is permitted under exceptional cases in six others. Strict foreclosure remained the prevalent mode in England until the enactment of Statutes 15 and 16 Victoria C. 86 (Par. 48), known as the Chancery Improvement Act, and the Conveyancing Act 44 and 45 Victoria C. 41 which provided that in an action for foreclosure or for redemption, the court, on request of the mortgagee or of any person interested in the right of redemption may, in its discretion, direct a sale of the mortgaged property on such terms as it thinks fit, including if it deems necessary, a deposit in court of a reasonable sum to meet the expenses of the sale and to secure the performance of its terms.

The courts of Illinois recognize both the legal and equitable theories of a mortgage. Thus, at law, the mortgage is regarded as a conveyance of the legal title to the creditor who takes it with the usual incidents. Upon breach of condition, the mortgagee may oust the mortgagor from possession of the premises and the former's

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2 Vol. VIII, 186-7 pp.
title becomes absolute subject only to the latter’s equity of redemption. On the equity side, the mortgage is considered as but a mere security and is no more than an incident to the debt or principle obligation. The trend of our judicial opinion, however, has veered more and more towards the equitable doctrines and away from the legal conception of the mortgage. For example, in the case of Barrett v. Hinckley it was said.

It must not be concluded, from what we have said, that the dual system respecting mortgages, as above explained, exists in this state precisely as it did in England prior to its adoption in this country, for such is not the case. It is a conceded fact that the equitable theory of a mortgage has in process of time made in this state, as in others, material encroachments upon the legal theory, which are now fully recognized in courts of law.

Thus, it is now settled law that the mortgagor or his assignee is the legal owner of the mortgaged estate as against all persons except the mortgagee or his assigns. Likewise, it has been held that the mortgagee has no such estate as can be sold on execution, nor does his widow enjoy any right to dower in it; upon his death, the mortgage passes to his personal representatives as personal property and may be bequeathed as such. Whereas the mortgagor’s interest may be sold on execution, it is subject to dower rights; it can be devised or will pass by descent to the mortgagor’s heirs at law.

In the last analysis, the title of the mortgagee is anomalous and exists only between him and the mortgagor and then only for the purpose of securing the mortgage debt. When the debt is barred by the statute of limitations, the mortgage estate perishes both at law and in equity, which proves conclusively that the mortgage title is measured by the existence of the indebtedness or obligation which it secures. Nor is the mortgagee’s title of such a character as to necessitate a reconveyance from him to the mortgagor in order to revest the latter with complete title when the mortgage debt has been satisfied. Of course, a release of the mortgagee’s inter-

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*Kransz v. Uedelhofen, 193 Ill. 477.
*124 Ill. 32.
*Lightcap v. Bradley, 186 Ill. 510; Schumann v. Sprague, 189 Ill. 425.
est may be evidenced by a written instrument, but an entry of satisfaction upon the margin of the record is equally effective.  

The courts of Illinois have, even in their earliest decisions, consistently and zealously protected the mortgagor's equity of redemption. In the case of Bearss, et al. v. Ford, Justice Mulkey stated:

But it is evident that parties cannot by mere agreement change the law of the land. Every deed or other instrument takes effect from its delivery and its character thereby becomes at once fixed. If a mortgage when delivered, it continues to be such until the right of redemption is barred by some of the modes recognized by law. Hence, nothing is more firmly established in the law of mortgages than that it is not competent for the parties even by express stipulation to cut off the right of redemption, and to permit them to make such an instrument an absolute deed upon some future contingency would simply be cutting off the right of redemption which, as we have just seen, cannot be done.

What, then, are some of the recognized modes of foreclosure, or better, the remedies available to the mortgagor upon condition broken, in Illinois? According to J. Breese, in Carroll v. Ballance, the mortgagee, upon default in the payment of his indebtedness or upon condition broken, may proceed personally against the debtor on the mortgage note and subject his general property to the judgment or he may bring ejectment on condition broken, or make peaceable entry; or file a bill in chancery for a strict foreclosure; for a foreclosure and sale, or if he prefers it, sue on a scire facias.

These remedies, it has been held, are concurrent and successive at the election of the mortgagee. Inasmuch as the scope of this paper is limited to the single remedy of strict foreclosure, the discussion will be confined to it.

The courts of this country have almost universally referred to strict foreclosure as a harsh and stringent

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1 Rev. Stat. Ill. Ch. 95, par. 89.
2 108 Ill. 16.
3 26 Ill. 9.
A recent Appellate Court case in Illinois has stressed this opinion by holding that strict foreclosures are not encouraged by the law; in some jurisdictions the remedy can be resorted to only when all the parties in interest consent and agree to it, in others that there are no judgment creditors or purchasers of the equity of redemption who have the right to redeem, and in still others, the remedy is absolutely forbidden by law; in Illinois there is no statute regulating strict foreclosure and we are therefore governed by the common law and the trend of judicial decision in this state.

The Supreme Court of Illinois, in the leading case of Lightcap v. Bradley, observed that while a strict foreclosure was permissible in a court of equity, if the circumstances justified it, still it was only in use to a very limited extent and then only under extraordinary circumstances. It is the only vestige of the former common law foreclosure remaining in the law of Illinois. As early as 1855, the courts of the state had judicially declared that although equity may grant relief by way of a strict foreclosure, the practice should not be encouraged. The granting of such relief, however, is discretionary with the court. But, when the interests of both parties manifestly require it, it will hardly ever be refused.

In general, a decree of strict foreclosure may be entered in Illinois when the four following facts have been made to appear: first, that the mortgagor is insolvent; second, that the mortgaged land is not worth the amount due upon the mortgage; third, that the mortgagee is willing to take the property in satisfaction of his debt; fourth, that the decree will not jeopardize the rights of junior incumbrancers, purchasers of the equity, or judgment creditors of the mortgagor who might benefit by the

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12 186 Ill. 510.
13 Weiner v. Heintz, 17 Ill. 259.
having the property put up for sale, thereby subjecting it to the payment of as many debts as possible. Where the bill shows that the mortgage was given for the entire purchase money of the mortgaged premises and that the value thereof is not in excess of the amount due on the mortgage, it is a proper case for strict foreclosure even if no appearance has been entered for the mortgagor. Similar relief was granted where all persons who derived title through the mortgagor disclaimed any interest in the foreclosed realty and tendered it to the mortgagee, even though the time during which he might have demanded a master's deed out of the original foreclosure had expired. And, where the parties to foreclosure proceedings have stipulated for a decree of strict foreclosure and have agreed that the court shall enter it, the defendants are not entitled to complain that the decree allowed them only six months in which to pay the principal of the note before barring their equity of redemption. A decree of strict foreclosure will lie not only in favor of a mortgagee but also in favor of the holder or holders of notes or other evidences of indebtedness secured by a trust deed encumbering the pledged real estate. While the earlier cases on the subject have quite uniformly suggested that the insolvency of the mortgagor constituted a proper case for strict foreclosure when coupled with the other circumstances enumerated under the general rule, there was room to doubt whether such insolvency was an indispensable element until the decision in Rabbit v. First National Bank of Rock Falls. Here the court said:

It is manifest that if the mortgaged premises are ample security for the mortgage debt, there would be no ground for strict foreclosure and this is true even though the mortgagor be insolvent, and so, if the mortgaged premises be not ample security for the mortgage debt,

16 Wilson v. Geisler, 19 Ill. 49.
17 Bissell v. Marine Co., 55 Ill. 165.
19 Ibid.
there would be no justification for a strict foreclosure if the mortgagee were solvent. It would be manifestly inequitable to deprive him of the right of redemption when he has ample means to do so. These two suggestions show the logic of the union of these two elements before strict foreclosure is proper. But their union would not be sufficient without the third, i.e. the creditor must take the property in satisfaction of his debt and the costs. We have already held that strict foreclosure can’t be granted unless it is alleged and proved that the owner of the land was insolvent and we certainly can’t indulge ourselves in a presumption that they are insolvent and unable to redeem.

In the light of the underlying decisions that strict foreclosure is sanctionable whenever the interests of both parties manifestly require it, the conclusiveness of the rule is to be questioned. Undeniably, the rule would operate to preclude a strict foreclosure if the property were valued at more than the mortgage debt and the mortgagor were insolvent, for it is the policy and object of the statute allowing redemptions from judicial sales to make the property pay as many of the mortgagor’s debts as it is worth. But, assume the hypothesis that the mortgagor is solvent with his assets somewhat frozen; that there are no junior encumbrances, creditors, or lien claimants interested in the mortgaged property; and that while the property may or may not be worth more than the mortgage debt, no ready sale can be had of it due to inactivity or depression in the real estate market, and the mortgagee is willing to take his chances with it and the mortgagor is agreeable so long as he is released from liability on the notes of indebtedness. In such a hypothetical case it is doubtful whether a court of equity would refuse to decree strict foreclosure merely because the complainant could not clearly show that the mortgagor was insolvent.

If it is sufficiently proved that the value of the mortgaged property is greater than the amount of the indebtedness, there can be no strict foreclosure under the Illinois practice. The value of the realty is a matter

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22 Gorham v. Farson, 119 Ill. 425.
of proof to be ascertained by the master; and, in establishing it, the opinions of witnesses competent to testify on the point may be heard.²³ Where the evidence is conflicting, and it is debatable whether or not the land is worth the equivalent of the mortgage encumbrance, the court has said:

Upon a strict foreclosure, if the value of the land be equal to the debt, the debt is considered as satisfied, but it does not operate as an extinguishment of the debt unless the land is of equal value. It is, not infrequently, a matter of agreement between the mortgagor and mortgagee, the land being about equal to the debt, that there shall be a strict foreclosure, in which case no equity of redemption remains.²⁴

The fact that the mortgagee has his choice of remedies, as heretofore outlined, either to enforce his lien upon the mortgaged premises or to have his debt satisfied out of the mortgagor's general assets, conclusively demonstrates that he must be willing as expressed in his pleadings to take the property in discharge of his debt before the court can consider the propriety of pronouncing a decree of strict foreclosure. In Farrell v. Parlier, the doctrine was expressed in this language: "Such a decree is not proper unless the mortgagee is willing to take the property in satisfaction of his whole claim."²⁵

The general rule that strict foreclosure is not permissible when there are junior encumbrances or creditors, or purchasers of the equity of redemption,²⁶ is not without exception. Witness the statement of the court in the case of Illinois Starch Co. v. Ottawa Hydraulic Co.:

"The court of conscience will not sacrifice or endanger the rights of a complainant who comes within her portals with a just cause, and holding the oldest and preferred lien and best equity, for a bare possibility of a wholly improbable benefit to one having a second lien and subordinate equity."²⁷

²⁴ Vansant v. Allmon, 23 Ill. 30.
²⁵ 15 Ill. 274.
²⁷ 125 Ill. 237.
ruled that when there is no possibility of any benefit accruing to the judgment creditor from an ordinary foreclosure, it is unreasonable and inequitable to penalize the holder of a first lien by making him pay unnecessary costs for which he will have no chance of being reimbursed due to the insufficiency of the value of the real estate and the insolvency of the mortgagor.\(^\text{28}\)

In cases where the mortgagor is dead and his estate is insolvent, and the equity of redemption has descended to infant heirs, the proper course is to order the property sold and not to decree a strict foreclosure.\(^\text{29}\) It should likewise be denied when the mortgaged estate is claimed as a homestead, or materially exceeds in value the amount for which it was encumbered; and unless the homestead right has been waived, the sale should be made subject to it.\(^\text{30}\)

The statutes of Illinois provide that no decree of strict foreclosure can be made upon a mortgage executed by a guardian on the real estate of his ward, but such mortgages must be foreclosed by petition presented to the county court, allowing redemption therefrom as is now provided by law in cases of sales under executions upon common law judgments.\(^\text{31}\) It is likewise provided in the statutes that strict foreclosures of mortgages given under court authority by executors or conservators of the estates of lunatics, idiots, or spendthrifts are forbidden.\(^\text{32}\) But, it is entirely proper for a mortgage executed by a trustee who holds title to the mortgaged property to be the subject of strict foreclosure. For example, in the case of Terre Haute Trust Company v. Wells Whip Company, et al.,\(^\text{33}\) a mortgage made by trustees under proper authority had been foreclosed upon decree of strict foreclosure and parties claiming under the title of said trustee and by devolution from it were estopped from insisting that the foreclosure proceedings were invalid because the beneficiaries under the trust had not been made parties to it. In that case, the con-

\(^{28}\) Rexroat v. Ford, 201 Ill. App. 342; Moffet v. Farwell, 222 Ill. 543.

\(^{29}\) Boyer v. Boyer, 89 Ill. 447.

\(^{30}\) Young v. Graff, 28 Ill. 20.

\(^{31}\) Rev. Stat. Ill., Ch. 64, par. 27.

\(^{32}\) Rev. Stat. Ill., Ch. 3, par. 124 and Ch. 86, par. 22.

\(^{33}\) 210 Ill. App. 602.
testants had failed to make the beneficiaries parties in their cross bill whereby the invalidity of the mortgage was sought to be established.

The frame of a bill for a strict foreclosure is nearly the same as that for a sale. The prayer, however, is different. It prays that an account may be taken of what is due the complainant on his mortgage and that the mortgagor may be decreed to pay the amount found due by a short day to be appointed by the court, or in default thereof, that the mortgagor and all claiming under him be precluded and deprived of their equity of redemption.

The settled practice in England on proceedings for a strict foreclosure as described in Smith’s *Chancery Practice* was to decree a reference to the master to take an account and tax costs, directing that if same are paid by the mortgagor at such time and place as the master shall fix, the mortgagee is to reconvey the premises by orders in default of payment at such time and place that the mortgagor be absolutely foreclosed from all equity of redemption in the mortgaged premises. . . . On the day appointed, either the mortgagee, or one duly authorized by him under a power of attorney, attends at the place appointed to receive the money, and remains there until the expiration of the time appointed. . . . If the mortgage money is not paid, the plaintiff, upon an affidavit of having duly attended and of the non-payment of the money, is entitled to an order on a motion as of course, that the defendant do from henceforth stand absolutely debarred and foreclosed of and from all right, title, suit, and equity of redemption of, in, or to the said mortgaged premises.34 The plaintiff must, however, in order to complete his title, procure a final order confirming it, otherwise the decree of foreclosure will not be pleasurable.35 Courts of equity, acting in good conscience, invariably allowed the defendant some measure of time within which to effect a redemption by tendering the amount due on the mortgage indebtedness plus the taxed costs. The length of this period rested largely in the discretion of the chancellor who customarily fixed it according to the circum-

34 I Smith, Chancery Practice (7th ed.) 781.
stances of the particular case, but in no case could it be entirely withheld. The practice early grew up of allowing six months or longer for this period of redemption. Thus, it is seen that, in England, two decrees were required to perfect a strict foreclosure: first, an interlocutory decree ordering a foreclosure if the debt be not paid within a stipulated period and, second, a final order of foreclosure upon proof that the money had not been paid as initially decreed.

In Illinois, the courts have not considered that two such decrees are necessary. The courts of this state have contented themselves by adjudging in a single and final decree that, if the indebtedness secured by the mortgage be not repaid with interest within a specified term after the date of the decree, the defendants shall be forever barred and foreclosed of all right and equity of redemption in and to the said premises and every part thereof; and thereupon all the right, title, and interest—both legal and equitable—shall be and become vested, absolutely and forever, unconditionally in the said complainant. In the words of the court in Ellis et al. v. Leek:

Although courts of chancery, in this state, are governed by the same practice as courts of chancery in England, or by rules and regulations consistent with such practice, we are unable to see wherein the practice here adopted is so inconsistent with that in England, as laid down by authors on chancery practice, as that it should be condemned. Under the one practice the title is vested in the complainant by an order in the decree; under the order, by a final order made subsequently.36

It has even been held that a decree of strict foreclosure need not stipulate in whom the legal title shall be vested, for by cutting off the equity of redemption, it confirms the title of the mortgagee.37 Under this practice, it is to be noted that a reconveyance from the mortgagee is required, if a redemption is tendered within the period allowed for it after the date of the decree, and a provision for this should be made in the decree itself.

A decree of strict foreclosure which fails to find the

36 127 Ill. 60. See also Mulvey v. Gibbons, et al., 87 Ill. 367; Chickering, et al. v. Fatles, 26 Ill. 508.

amount due under the mortgage and which allows no time during which the ascertained debt is to be paid and the mortgagor’s estate redeemed from the decree, has been held unsustainable. Hence, any such decree which is final and conclusive in the first instance can be set aside. In Illinois, no standard period, within which the mortgagor may enjoy the right to effect a redemption after the decree, has been definitely fixed upon. It has been held that a month was too short a period for payment on rendition of a decree of strict foreclosure. The Appellate Court in another case, where the mortgagors had consented to the entry of a decree of strict foreclosure and the decree had ordered them to convey the mortgaged premises by warranty deed within five days thereafter, upheld the contested decree despite its extreme effect. But, it has been repeatedly held that in the case of an irredeemable sale of real estate, not less than ninety days should be given. The duration of this period should be determined with a view to the amount of the indebtedness and in the same ratio, that is, the larger the debt, the longer the period. When the grantee of a mortgagor, served by publication only, in a foreclosure of the mortgage out of which a decree of strict foreclosure allowing a ninety-day period of redemption defaults, he is entitled to file his petition for leave to answer within three years after the rendition of the decree as provided for in Section 19 of the Chancery Act.

A decree of foreclosure must correspond with the mortgage and with the allegations of the bill and the evidence, or it will be reversible for error. If the court possessed jurisdiction, the decree will be supported by all the presumptions of regularity and validity with which public policy invests judicial sentences. Therefore, if the decree is not void, although erroneous or irregular, it will not be open to collateral attack or impeachment.

28 Clark v. Reyburn, 8 Wall. 318.
21 Farrell v. Fariller, 50 Ill. 275.
42 Scott v. Milliken, et al., 60 Ill. 112.
43 Black on Mortgages in Illinois.
Thus, bona fide purchasers for value from complainant under a strict foreclosure are unaffected by an error in the decree, as announced by the court in *Horner v. Zimmerman*, "As he was a bona fide purchaser for value without notice, his partition can't be assailed nor affected by any error in the decree should there be one.' But, he acquires no clearer or stronger title than the mortgagee had taken from the mortgagor upon the execution of the mortgage.

That the practice of strict foreclosure has been in disuse in Illinois is evidenced by the dearth of recent cases wherein the relief was sought. Because of certain unfortunate economic conditions prevalent today, however, it is quite likely that the remedy will again be commonly resorted to. Indeed, it would seem to be decidedly expedient in current foreclosure practice. When the value of real estate so drastically declines as has been the experience in most of our larger cities of late—owing to excessive speculation in building construction and real-estate subdivision—many property owners are rendered insolvent, mortgages go into default, and wholesale foreclosure becomes the order of the day. Under such circumstances, the utility of the practice of seeking relief for the mortgagee or the bond- or note-holders, secured by the mortgage or the trust deed, by way of a strict foreclosure becomes manifest. Courts of equity have always tried to protect parties before them with just causes from the accrual of useless and unnecessary costs. Wherever the remedy of strict foreclosure can be properly prayed for in accordance with the rules which have been hereinbefore reviewed and commented upon, great delay and expense can be avoided by pursuing it. Again employing the language of the court, "If, however, the value of the land does not equal the amount of the debt, no decree of sale should be made; that would be useless and make unnecessary costs. To have foreclosed the mortgages in the ordinary method would have made a bill of unnecessary and useless costs.' But, over and above these considerations,

McMahill v. Torrence, 163 Ill. 277.
Scott v. Milliken, 60 Ill. 112; Barnes v. Ward, 190 Ill. App. 392.
many cases will come up wherein it would be more advantageous to the mortgagee expeditiously to assume the ownership and management of the mortgaged premises in his own right after the mortgagor’s default and insolvency, despite the inadequacy of the value of the property to satisfy the mortgage indebtedness at that time than to have the property judicially sold, thereby sustaining an immediate loss on his investment. For instance, it may be found that by economical management; by the making of necessary repairs; or even by renovating, adding to, or remodeling the improvements in the mortgaged premises, the income may be increased to the point where the mortgagee’s investment can be entirely recouped. In such cases, the sooner the insolvent mortgagor’s equity of redemption and right to possession are terminated, the better the mortgagee’s chances of liquidating his debt. If the mortgagor is permitted to remain in occupancy, the premises might suffer undue depreciation because of his inability adequately to maintain them. If the property produces an income, a receivership, to be sure, may be had, but receiverships are expensive and rarely satisfactory. The mortgagee’s surest and quickest relief, therefore, in face of these conditions, would be by way of a strict foreclosure.