March 1941

Proposed Illinois Real Estate Mortgage Act

Hazel Crawford

Follow this and additional works at: https://scholarship.kentlaw.iit.edu/cklawreview

Part of the Law Commons

Recommended Citation
Available at: https://scholarship.kentlaw.iit.edu/cklawreview/vol19/iss2/1

This Article is brought to you for free and open access by Scholarly Commons @ IIT Chicago-Kent College of Law. It has been accepted for inclusion in Chicago-Kent Law Review by an authorized editor of Scholarly Commons @ IIT Chicago-Kent College of Law. For more information, please contact dginsberg@kentlaw.iit.edu.
Illinois has been laboring long under the hampering yoke of mortgage enforcement laws which are cumbersome and expensive, and which therefore discourage the investment of funds in mortgages on real estate located in this state. True, there are investors currently braving these laws, but when the tide turns from the present "borrowers market" Illinois may be one of the first states to feel the effects of withdrawn funds unless these laws are remedied.

Fortunately, a bill revising the Illinois law of mortgages has been drafted by the very able real estate lawyers who compose the Chicago Bar Association Committee on Mortgages and Foreclosures Laws, in co-operation with the Committee on Mortgages of the Section on Real Estate Law of the Illinois State Bar Association. This bill has been introduced in the present session of the General Assembly, where it has been referred to the Judiciary Committee. We shall not now treat with all of the changes to be effected by the bill if enacted; only a few outstanding ones will be noticed.

Negotiability

In *Olds v. Cummings*, decided by the Illinois Supreme Court in 1863, which involved the foreclosure of a mortgage securing two notes, it was held that a mortgage did not par-

---

1 Member of Illinois Bar.
4 31 Ill. 188 (1863).
take of the negotiable character of the note it secured. In subsequent decisions this doctrine has been relaxed, although the case has not been actually overruled because in reaching its decisions in the later cases the court distinguished the facts from those in Olds v. Cummings. The most recent of these more liberal decisions is that of Marks v. Pope, in which the Supreme Court held that usury is not available as a defense in a foreclosure suit where the plaintiffs are bona fide purchasers of bearer bonds secured by trust deed.

The question of negotiability has been settled in the present draft of the new foreclosure bill by making the mortgage in the hands of a bona fide purchaser thereof for value "subject only to such defenses of the mortgagor, his legal representatives or assigns, as appear of record at the time the mortgage is recorded or appear in the mortgage itself or would be available in an action at law upon" the credit instrument. The limitation of defenses to those of the mortgagor, his legal representatives or assigns leaves unaffected the claims of lien creditors, and these are further protected by Section 191, which specifically provides that the act relating to mechanics' liens shall not be affected by the proposed Mortgage Act.

INCLUSION OF PERSONAL PROPERTY IN THE MORTGAGE

One of the difficulties encountered where a mortgage is placed upon an apartment building, furnished or unfurnished, or upon hotel property is the inclusion of a lien upon the refrigerators and the furnishings and equipment used in and about the building incidental to its operation. Although the loan may be for ten, fifteen, or twenty years, the statute limits the period of a mortgage on chattels to not to exceed three years, with right of renewal for a short period. A care-

7 370 Ill. 597, 19 N.E. (2d) 616 (1939).
8 Proposed Act, § 12.
10 Ibid., Ch. 95, § 4.
ful lawyer can, and will, of course, make due provision for renewals and new chattel mortgages by a covenant in the trust deed or mortgage to this effect, but in practice the enforcement of such a covenant is often awkward and undesirable. At best, it is not the satisfactory procedure that a mortgage at the beginning of the term for the entire period of the loan would be.

Then, too, the present act relating to chattel mortgages declares\(^\text{11}\) that no conveyance of personal property having the effect of a mortgage or lien thereon shall be valid as against the rights and interests of any third person unless possession of the property is delivered to and remains with the grantee or unless the instrument provides for possession to remain with the grantor and the instrument is acknowledged and recorded or filed as provided in that act.\(^\text{12}\) Such mortgage must be recorded or filed in the office of the proper recorder of deeds within ten days of its execution or it will not be valid as against the creditors of the mortgagor even though later admitted to record but will be fraudulent and void as to such creditors.\(^\text{13}\) The result is that, if the provisions of this act are not meticulously followed, the mortgagee may find he has no mortgage on the chattels.

As if this were not enough, the statute regulating the assignment of notes secured by chattel mortgages requires that a note so secured bear a notation indicating that fact, or the mortgage will be void.\(^\text{14}\) However, the courts have held that as between the original parties the mortgage will be valid even though it does not bear such endorsement.\(^\text{15}\) The note when endorsed or assigned by the payee is made subject to all defenses existing between the payee and the payor.\(^\text{16}\) Contrast this complicated procedure with the comparative simplicity of a real estate mortgage.

11 Ibid., § 1.
12 A special section, ibid., § 1a, deals with consumable property and unplanted crops.
13 Ill. Rev. Stat. 1939, Ch. 95, § 4.
14 Ibid., § 26.
15 Sellers v. Thomas, 185 Ill. 334, 57 N.E. 10 (1900); Hogan v. Akin, 181 Ill. 448, 55 N.E. 137 (1899). See also Springer v. Lipsis, 209 Ill. 261, 70 N.E. 641 (1904), where possession of the mortgaged property was taken before the lien of a third party attached.
16 Ill. Rev. Stat. 1939, Ch. 95, § 26.
The proposed new mortgage act cures these difficulties by providing that personal property used in the operation, maintenance, care or use of the mortgaged real estate or improvement thereon, or furnished for the use of a lessee or other occupant of the premises, or used in the conduct of any business, enterprise or other activity conducted on the premises, including replacements and after-acquired property, may be included in a mortgage of the real estate. Excluded are "the mortgagor's household goods, or the implements, stock, crops, supplies or equipment of his farm, or the stock in trade of his business."

Under the proposed mortgage act, compliance with the law relating to chattel mortgages would be unnecessary to the validity of the mortgage lien upon such personal property. With the recording of the instrument as a real estate mortgage in the county in which the real estate is located, the lien of the mortgage on the personal property would be effective as against all persons as long as the personalty remained on the mortgaged property. For all purposes of the act, such personal property would be "deemed, treated and dealt with in all respects as a part of the real estate to which it appertains," even as to foreclosure.

**Period of Redemption**

One of the most drastic changes embraced in the proposed act is the reduction from fifteen to six months of the over-all period of redemption. Although the Illinois law was changed by statute in recent years to permit waiver of the right of redemption by a corporate mortgagor (a provision retained in the proposed act), the right of redemption in the individual is so inherently and sentimentally a part of the law of this state as to be considered sacred and something not to be tampered with. Investigation of the theory of the redemption period and of the percentage of cases in which redemption has been made would make this position seem to be without solid foundation. The purpose of the redemption period is to give the owner an opportunity, a breathing space

17 Proposed Act, § 21.  
18 Ibid., § 22.  
19 Ibid., § 23.  
20 Ibid., §§ 67, 68.  
22 Proposed Act, § 83.
as it were, to re-adjust his finances, or to refinance the property if possible. If he cannot do this within six months after the foreclosure sale, it would seem unlikely that he could do it more readily in fifteen months. Of course, it can be argued that the longer the period of redemption, the greater the possibility of a financial recovery, but to follow that argument to its ultimate conclusion would be to extend the redemption period indefinitely.

As a practical matter, the longer redemption period serves only to increase the cost of investment to the mortgagee, and because of that to discourage investments within the state. It is economically unsound to have real estate tied up in the processes of foreclosures and redemption. Such a situation results in a stalemate, which prevents the healthfulness of a free market because the title is unmarketable until the redemption period has run. The committee which prepared the draft of the proposed act made inquiry, necessarily limited but still indicative, of the number of redemptions made during the great foreclosure era through which we have recently passed, and it was found that except for those made as a part of reorganization machinery the percentage of redemptions in the foreclosures in the state during that period as to which they had information was minute. If a man must permit his property to go through the processes of foreclosure because of defaults in periodic payments, it is unlikely that he can redeem it after the entire debt has been accelerated and the additional expenses incident to the foreclosure have been incurred. As for redemption by one not the owner, this rarely occurs.

The effect of the redemption statute is favorable not alone to the mortgagee for it will force a larger bid and thus reduce the deficiency judgment. Moreover, the new bill contains a protective provision23 which allows "any person liable for the payment of any balance of the mortgage indebtedness remaining unpaid after the application of the proceeds of the sale" to claim as a credit on his debt, where the property has been directly or indirectly acquired by the owner of the indebtedness, the difference between the amount of

23 Ibid., § 112.
the bid and the fair market value of the property at the time of sale if the latter should be greater than the bid.24

A further feature of the proposed act favorable to the owner of the property sold, which would change the present law, is contained in Section 63, which permits the owner to purchase at the sale free and clear of interests and liens not having priority over the foreclosed mortgage, except interests and liens which would be recognized or enforced if the owner or his assignee had then acquired title otherwise than through foreclosure sale.

Another proposed change in the redemption machinery is to reverse the order in which redemptions may be made, that is, to permit redemption by creditors in the first part of the redemption period and by the owner in the last period. Such a change in the order of redemption has been suggested from time to time, at least as early as 1925.26

The present redemption statutes in Illinois are complicated, and to consider them adequately would require more space than can be given to the subject here. For the present purpose, which is to point out the simplification of redemption procedure and what may be considered the advantages of the changes which would be effected by the proposed act, it is sufficient to generalize.

The law under which we have been operating, of course, gives "any defendant, his heirs, executors, administrators or assign, or any person interested in the premises, through or under the defendant" (except corporations which have waived the redemption privilege) the right to redeem during the first twelve months following the foreclosure sale,27 and any decree or judgment creditor, his heirs, executors, administrators or assigns (who are not required to have an interest in the property) during the immediately subsequent three months.28 If redemption is made by one entitled to re-

24 Provision is made for reducing the credit claimed against a holder of only part of the indebtedness "to that proportion thereof which such part of the indebtedness bears to the entire indebtedness and shall be applicable only to that part of the indebtedness." Ibid., § 115.
25 Ibid., §§ 64, 65, 67, 68.
28 Ibid., § 20.
deem in such three-months' period, he must resort to execution sale, and if there are successive redemptions, each redemption must follow the same procedure.\textsuperscript{29}

The mortgage act now pending before the legislature limits redemptions to any person having an interest in or lien upon the specific property,\textsuperscript{30} and thus eliminates the anomalous redemptions permitted under the present law in the state.\textsuperscript{31} Further, each redemption under the proposed act would operate as an assignment of rights of the purchaser at the foreclosure sale\textsuperscript{32} and would be effected by\textsuperscript{33} depositing with the officer who made the sale, for the benefit of the party from whom redeemed, the redemption moneys, so that there would be only one sale, i.e., the sale pursuant to the decree of foreclosure.

**RENTS AFTER SALE**

At the present time, in the absence of a provision to the contrary in the mortgage instrument, the rents during the redemption period belong to the owner of the equity of redemption.\textsuperscript{34} However, where the mortgage instrument creates a lien upon such rents, the court may appoint a receiver to collect the rents and apply them on the deficiency, if any, resulting from the foreclosure sale.\textsuperscript{35} Any balance of such rents after payment of the deficiency and other charges allowed by the court belong to the owner of the equity of redemption.\textsuperscript{36} After the redemption period has run, if the master's deed is not promptly issued to the party entitled to it, the rents from the time the period of redemption ends to the time the deed is issued belong to the owner of the equity of redemption whether or not the mortgage instrument contains provision for a lien on rents. Legal title to the property is in the owner of the equity of redemption until such deed is issued, and if it is not issued within the statutory period of

\textsuperscript{29} Ibid., § 23.
\textsuperscript{30} Proposed Act, § 64.
\textsuperscript{31} Ill. Rev. Stat. 1939, Ch. 77, §§ 18-27; ibid., Ch. 72, § 10.
\textsuperscript{32} Proposed Act, § 69.
\textsuperscript{33} Ibid., §§ 77, 78.
\textsuperscript{34} Owsley v. Neeves, 179 Ill. App. 61 (1913).
\textsuperscript{35} Henry v. Woolf, 187 Ill. App. 129 (1914).
\textsuperscript{36} Stevens v. Hadfield, 196 Ill. 253, 63 N.E. 633 (1902); Stevens v. Hadfield, 178 Ill. 532, 52 N.E. 875 (1899); Haigh v. Carroll, 209 Ill. 576, 71 N.E. 317 (1904); Longley v. Wilk, 171 Ill. App. 419 (1912); Townsend v. Wilson, 155 Ill. App. 303 (1910).
five years after the redemption period has run\(^37\) the certificate of sale becomes null and void and the title remains in such owner, unless the deed was wrongfully withheld or its issuance enjoined by court order or decree.\(^38\) Even though the trust deed provides that the person entitled to a deed under foreclosure sale is entitled to the rents during the redemption period, the courts will not so apply such rents.\(^39\)

The proposed act gives to the person ultimately entitled to the deed to be issued pursuant to the foreclosure sale the rents, issues and profits of the property during the period from the foreclosure sale until the deed issues, or the time allowed for its issuance expires, whether or not the mortgage constitutes a lien upon, or contained an assignment of, such rents, issues and profits, and regardless of whether the amount realized on foreclosure sale was less than the mortgage indebtedness.\(^40\)

**Trustees and Committees**

Of interest to lawyers and small investors should be the sections of the proposed act relating to trust deeds and trustees thereunder,\(^41\) and to committees and other group action.\(^42\) With these sections as a part of the statutory law of Illinois, investors might again become interested in bond issues, without which it is sometimes difficult to finance large properties. Before discussing these provisions, it may be of interest to digress somewhat in order to refer back to situations which were, at least in part, responsible for their incorporation into the proposed act.

Prior to the debacle in the fall of 1929, real estate first mortgage bonds were considered a conservative and proper investment for those who were not in a financial position to indulge in the speculative field of stocks or who could not make a large investment. Then came the defaults in a torrent, sweeping away the income from these bonds thought to


\(^{38}\) For a detailed discussion of receivers and the right to rent, see Reeve, Illinois Mortgages, Ch. 28, where the subject is dealt with ably and at length.


\(^{40}\) Proposed Act, § 92; § 93 makes specific provision for refunding these rents in the event redemption is made.

\(^{41}\) Ibid., §§ 121-141.

\(^{42}\) Ibid., §§ 151-158.
be so secure, and in all too many instances causing shrinkage of the principal.

The procedure developed of forming committees, the personnel of which was composed largely of responsible men who were experienced in the financial and real estate fields, and most of whom probably had been with the trustee or the house of issue as officers or employees and who had been familiar with the properties or bond issues in question while the securities were being sold or serviced. Deposit agreements were prepared by lawyers for the committees, the bondholders were notified of the defaults and the formation of the committees, and were asked to deposit their bonds with the depositary (usually a department of the trustee) under the terms of the deposit agreement. Because the cost of printing and mailing these deposit agreements to all bondholders were prohibitive, a copy usually was kept on file with the depositary open for inspection by the holders of the bonds to which it would relate, and a summary of the provisions of the deposit agreement was mailed to the bondholders. The committee, when it represented sufficient bonds to comply with the requirements of the trust deed, might then direct the trustee to foreclose. In some cases it was possible to acquire the property for the bondholders and complete reorganization without a foreclosure.

Great was the opprobrium sometimes cast upon these committees by a few people who charged them with being self-perpetuating, of "milking" the properties, and of not making bondholders members of the committees.

A recent law review article, in speaking of deposit agreements says: "These deposit agreements were long and contained very drastic provisions as regards the rights of the bondholders. They gave the committee practically unlimited powers to deal with the defaulted properties." And later, on the same page, the article states: "The drastic, if not vicious, deposit agreements have so far proved effective."

It is difficult for a lawyer who has worked with a conscientious committee which has effected the reorganization

43 Carey and Higgs, "Reorganization—The Last Chance," 34 Ill. L. Rev. 549, 551 (1939).
of an extraordinarily large number of properties under long deposit agreements containing "practically unlimited powers to deal with the defaulted properties" to read that statement without feeling a degree of shock over the description of those deposit agreements as "vicious." That article and the many statements it contains require a detailed answer too lengthy to be attempted here. But a word of explanation concerning the reason for those powers may not be amiss. It is simply that there devolved upon the committee the responsibility of entering into negotiations and completing contracts looking toward an ultimate reorganization of the property. Unless the deposit agreement gave the committee flexibility so that it and those with whom the committee dealt had assurance that it could complete its undertakings, it could not function effectively.

The depositors had the privilege of withdrawal for a limited time after submission of the plan of reorganization to them—a time long enough for the depositor to decide whether he wanted to participate in the plan or act independently of the committee. Furthermore, regardless of the complete powers vested in the committee under the deposit agreement, the committee was in a trust relationship to the bondholders who deposited, and a court would hold the committee members to the duties of a trustee and to strict accountability of the trust.

Without undertaking a detailed defense in their behalf, it would appear that the cases were infrequent where committees thus formed did not represent the depositing bondholders well in the light of all of the circumstances. They stepped in and performed a service, and performed it well, at a time when it was needed to preserve the investment for the bondholders who could not act independently with respect to the mortgage or trust deed.

If the reorganization personnel was closely bound up with the trustee and the house of issue, this was considered necessary to protect the responsibility which the trustee and the house of issue felt to the investors, the bondholders, and to protect the advances of funds made by the trustee which were required to carry on the committee work, to pay the out-of-pocket expenses incurred in foreclosure of the trust
In many cases the payment of taxes and acquisition of tax sale certificates to stop the accrual of huge tax penalties where the earnings of the property were insufficient. Without these advances the investment of the bondholders would be further jeopardized.

The committee members selected were for the most part experienced business men familiar with the operation of properties and investments. It seems patent that to put a man on a committee simply because he owned some of the bonds would be hazardous to the welfare of all of the holders of bonds of that particular issue, unless in addition to his bondholdings he had the experience necessary to qualify him for the work which the committee had to do and the responsibility to make him exercise care in his dealings with and on behalf of the bondholders. It was interesting to observe during that hectic period that many of those who complained most bitterly about the committees and denounced them most loudly were not original holders of the securities but those who, for the purpose of speculation, had bought them after the foreclosure proceeding was started. And there were critical others who did not fully appreciate the practical problems involved. To critics, however, we should be grateful, because, although they may make life more difficult, they also make man more careful in the exercise of his powers.

With the default in mortgage payments came also a complete collapse of our economic structure. Because of decreased earnings, families doubled up and tripled up in one apartment. This caused vacancies, which in turn caused lowered rentals. Added to this was the further grief of high taxes and inability to pay them from the reduced earnings of the properties, with the resultant tax defaults and rapidly pyramiding penalties. Because of the general situation, people were not investing in real estate, and purchasers for the properties, either in court or out of court, could not be found.

It was impossible for the committees to push the foreclosure proceedings to sale, and thus save fees and expenses incident to the properties being in foreclosure, until money could be obtained in some fashion to pay the out-of-pocket expenses of the proceedings, including the nondepositors’
share of the sale proceeds. As soon as this money could be obtained, the trustee, the committee, and their attorneys would, if necessary, usually accept notes of the reorganization entity for their fees and expenses, and the deposited bonds were credited with the share allocable to them without the passage of any money. This would permit the committee to acquire the property at the foreclosure sale for purposes of reorganization with a minimum outlay of cash. An outside bid could not be found which would pay anything to the bondholders after expenses.

Out of this situation arose three questions in particular which were new to our state equity courts. The first of these involved the right of the trustee under the trust deed to bid for the property, or the power of the court to direct the trustee to bid. The second, concerned the power of the court to set an upset bid price for the property. The third question, as to whether the state equity court had the power to pass upon plans of reorganization, also arose around this time, partly as a result of the Securities and Exchange Act, which became law in 1933.

**RIGHT OR DUTY OF TRUSTEE TO BID**

The law in Illinois on the problem of whether the trustee has the right to bid and whether the court has the power to direct the trustee to bid has been established by judicial decisions. A very brief resume of the cases may be of some interest.

The first of these to be considered by the Appellate Court was *Straus v. Chicago Title & Trust Company*, in which an order of the Circuit Court of Cook County, denying a bondholder leave to file an intervening petition in a foreclosure suit by which she sought, among other relief, to have the trustee directed to bid at the foreclosure sale for the benefit of the bondholders, was reversed by the Appellate Court and the matter remanded with directions to proceed in accordance with the views expressed in the opinion. The views on the question of a bid by the trustee were that under the provisions of the trust deed the trustee might purchase the prop-

---

44 273 Ill. App. 63 (1933).
property at the sale for the benefit of the bondholders, and that the chancellor might compel such purchase.

In the fall of 1935, the Illinois Supreme Court, in *Chicago Title & Trust Company v. Robin*, for the first time considered the question of whether a court of equity has the inherent power to order a trustee to bid for trust property at a foreclosure sale where the trust deed does not expressly so provide. The decision was that it has not such power, and the Appellate Court was reversed. This decision was followed in *Chicago Title & Trust Company v. Bamburg*, a case with similar facts. Likewise, in *Grant v. West End Pine Building Corporation*, the court held that unless the trust deed contained an express provision conferring upon the trustee the right to bid or conferring upon the court the power so to direct it, a court of equity lacks inherent authority to order the trustee to bid at a foreclosure sale.

Some adverse criticism has been directed at those decisions which fail to construe into the trust deed the right of the trustee to bid for all bondholders where the provisions of the instrument do not expressly give this power. When the point is raised that the bondholder should have the right to decide whether he wants cash or a participating share in the property, the reply sometimes is that the committee representing the majority bondholders "chills" the bidding, the price bid is not a fair representation of the value of the property, and thus the nondepositor does not receive a fair return on his investment, whereas the depositors have an unfair advantage in that they acquire the property, and the nondepositor, or minority bondholder, is not protected. The conclusion of those who advance this criticism is that the trustee should acquire the property for all of the bondholders and thus all would be equally protected.

It would seem that the criticism is not convincing if the court assumes jurisdiction of the plan of reorganization and permits the committee to bid. The court may alter the provisions of the plan if they appear to it to be inequitable, or it may substitute an entirely new plan, and may approve or disapprove the fees and expenses of the reorganization. The

47 361 Ill. 488, 198 N.E. 349 (1935).
nondepositor may deposit if he wants to share in the property, or he may take his share of the proceeds of sale if he prefers to realize what he can on his investment without further delay. There are many bondholders who are at an age where the delay involved in liquidating the property at a reasonable sale price so that they might receive more cash on their investment would mean that before this could be accomplished they would have passed into that realm where material assets are of no avail and the only assets that matter are the good deeds they have done. This is a practical and a real aspect. Admittedly these do not constitute all non-depositors. Some of the minority bondholders refrain from depositing to give their bonds a "nuisance" value, others because they prefer to realize on their investment as soon as possible. Whatever the reason, the minority bondholder should have the right to decide what he wants to do where he has not contracted away this right by buying securities which are secured by a trust deed containing proper provision for the trustee to acquire the property on behalf of all of the bondholders.

The proposed act provides that upon a petition being filed in a proceeding to foreclose a trust deed in the nature of a mortgage securing bonds or notes which are held by more than one person and where the entire indebtedness has become due by acceleration or otherwise, the court may authorize or direct the trustee to bid at the foreclosure sale for the property involved in the proceeding for the benefit of the holders of all of the outstanding bonds or notes.\(^48\) Such petition may be filed by the trustee or the holders of not less than 10 per cent in amount of the securities then outstanding,\(^49\) but must be joined in by the holders of two-thirds in amount of the securities in order that the relief prayed for might be granted.\(^50\)

In connection with these sections, it is interesting to note the decision in *Detroit Trust Company v. Stormfeltz-Loveley Company*\(^51\) where it was held that a Michigan statute authorizing the court, upon the petition of a majority of the bondholders, to direct the trustee to bid where it appeared that

\(^{48}\) Proposed Act, § 131. \(^{49}\) Ibid., § 132. \\
^{50} Ibid., § 134. \(^{51}\) 258 Mich. 655, 242 N.W. 227 (1932).
no bid was made or obtainable, seriously impaired the obliga-
gations of the contract of the nonassenting bondholders and
that there was a serious deviation from the express trust
created by the trust deed. However, in that case the statute
was enacted after the mortgage in question was made,
whereas the proposed Illinois act does not affect existing
mortgages. Nor does Article X thereof (containing the pro-
visions in question) affect the provisions of the trust deed
on the points covered in such article, but the relief provided
for therein may be available to the extent not inconsistent
with such provisions. Another factor in that case was that
the nonassenting bondholders did not receive notice and
therefore could not appear. Although the trustee could fore-
close on behalf of the bondholders without notice to them as
to the foreclosure suit, the court said that "notice was nec-
essary under the special type of proceeding provided by the
act." Section 133 of the proposed Illinois mortgage act pro-
vides for notice, and section 134 gives the right of hearing to
any bondholder.

Power to Fix an Upset Price

The second question referred to above as to the right of
the court to set an upset price to be bid, is not dealt with by
the proposed act, except that section 132, which states who
may sign the petition praying that the trustee be directed or
authorized to bid at the foreclosure sale, requires that the
petition set forth the maximum and minimum amounts which
it is proposed the trustee shall bid.

When the Illinois Supreme Court handed down its de-
cision in the Robin case, it indicated that the court could
not set an upset price. However, this was not necessary to
the decision, as the court pointed out in Levy v. Broadway-
Carmen Building Corporation, in which it held that the
equity courts of Illinois do have the power to fix an upset
price, and said:

There is little or no difference between the equitable jurisdiction and
power in a chancery court to refuse approval to a report of sale on fore-

52 Proposed Act. § 192.
54 366 Ill. 279, 8 N.E. (2d) 671 (1937).
closure, and the power to fix, in advance, a reserved or upset price, as a minimum at which the property may be sold. . . . No reason appears why the chancellor cannot prevent a sale at a grossly inadequate price by fixing a reasonable sale price in advance. The same judicial power is involved in either action.

By way of dicta the court added:

The fixing of an upset price does not violate section 10 of article 1 of the Federal constitution nor section 14 of article 2 of the Illinois constitution, which inhibit the impairment of the obligation of contracts. The reserved price dealt only with the remedy. . . .

Thus, the power of the equity court to fix an upset price at a foreclosure sale is recognized in Illinois.

POWER TO APPROVE PLAN OF REORGANIZATION

In 1933 the Securities and Exchange Act made unlawful the transportation of securities or the sale or offer to buy securities in interstate commerce or through the mails unless a registration statement was filed with the Securities and Exchange Commission and unless the prospectus relating to the securities met the requirements of such act. The preparation and printing of these forms and the exhibits to them were costly, and were practically prohibitive in the average reorganization of real estate. Some discretion was permitted the Commission to exempt classes of securities. However, many reorganizations could not come within the exemptions, and to ease further the situation as to reorganizations an amendment was passed in 1934 to provide for certain exempted securities and exempted transactions in addition to those provided for when the act originally became law. Among these exemptions were securities issued in a reorganization pursuant to a plan which has been passed upon by a court.

Committee then began to present plans of reorganization to the state equity court for approval in the foreclosure proceeding. The question as to whether such court has the power to pass on a plan of reorganization in a foreclosure proceeding was first presented to the Supreme Court of this state in First National Bank v. Bryn Mawr Building Corpora-

56 Ibid., §§ 3 and 4 respectively.
57 Ibid., § 3 (a)(10).
The foreclosure decree had been entered at a previous term of court and had become final. The court held that equity courts of this state should, and do, have such jurisdiction.

Article XI of the proposed act confirms specifically the jurisdiction of the foreclosure court to approve a plan of reorganization. It constitutes the members of the committee trustees and subjects them to the supervision of the court, prescribes certain provisions of the deposit arrangement, provides for judicial supervision of all group action, and permits the court to consider "the fairness and feasibility of the plan," which may not be approved, however, without notice and hearing for all. The court may fix the fees and "pass upon the propriety of all expenses paid or incurred in connection with the plan," and may "approve the terms and conditions of any proposed issuance and exchange of securities under a deposit agreement or a plan...." It should be noted also that the proposed act deals specifically with the highly controversial question of control of bondholders' lists. These provisions and those last discussed, dealing with supervision of group action, should clarify a situation upon which there has been little law in this state and should serve as guideposts for lawyers and courts alike.

METHODS OF FORECLOSURE

A new and interesting provision is contained in section 34 of the proposed act, which contemplates the accomplishment by passive means of a result which has often been effected by the affirmative act of the parties. That is the acquisition by the mortgagee of absolute title to the mortgaged property free and clear of liens and of the equity of redemption. That section permits the court to enter a decree in the foreclosure proceeding which would satisfy the mortgage indebtedness by vesting absolute title to the mortgaged property in the mortgagee free and clear of all claims, liens and interests of the mortgagor and those claiming through him, where all

58 365 Ill. 409, 6 N.E. (2d) 654 (1937).
59 Proposed Act. § 151.
60 Ibid., § 152.
61 Ibid., § 153.
62 Ibid., § 154.
63 Ibid., §§ 155, 156.
64 Ibid., § 157.
65 Ibid., § 158.
66 Ibid., §§ 161-164.
67 Ibid., §§ 151-158.
parties to the suit agree to such decree, or, even if all do not agree, such decree may be entered if the relief is prayed for in the complaint, if no defendant is a minor or under other disability, and if personal service has been had on the owner and his or her spouse and neither of them files an answer objecting to the entry of the decree. Title obtained by the mortgagee under this section would also be free and clear of all rights to redeem except where a defendant other than the owner answers, objecting to the decree, in which event the objector would have the same rights of redemption which he would have had there been a foreclosure sale to the mortgagee for the full amount of the mortgage indebtedness. It is obvious that such a decree if entered would save much of the present foreclosure expense, since it obviates the necessity for a foreclosure sale.

This is not to be confused with strict foreclosure, which is preserved in the present act,68 but which has been rarely used in Illinois. Strict foreclosure does not find favor with the courts because it cuts off the equity of redemption. They have, therefore, clothed it with difficulties. Illinois statutes actually prohibit it in the case of mortgages made by executors,69 guardians70 and conservators.71 The present provisions for foreclosure by scire facias72 have not been carried into the proposed act, but have instead been specifically repealed.73

Provision is made in the pending bill74 for sales under powers, which are at present forbidden under Illinois law,75 although they were at one time permissible.76 The procedure contemplated follows in general that prescribed for foreclosure under the proposed act. However, a partial foreclosure under power of sale would not be possible, because it is required that the entire mortgage indebtedness shall have become due, either by acceleration or otherwise.77

70 Ibid., Ch. 64, § 27.
71 Ibid., Ch. 86, § 22. For a discussion of strict foreclosure in general, see Reeve, Illinois Mortgages, Ch. 37.
72 Ill. Rev. Stat. 1939, Ch. 95, §§ 18-22a. 73 Proposed Act, § 191.
74 Ibid., §§ 41-53. 75 Ill. Rev. Stat. 1939, Ch. 95 § 23.
76 Reeve, Illinois Mortgages, § 838.
CONCLUSION

One of the most practical and far-reaching effects of the new act, if enacted, would be the reduction in the costs necessary to the foreclosure of the mortgage instrument and the reorganization of the property involved. This attempt to make foreclosure less expensive is particularly illustrated by section 33, which provides that unless an exceptional situation requires reference to a master in chancery or commissioner, "the evidence shall be taken in open court," except in the case of matters of complicated account where the items are disputed. It further provides that if a fact alleged in the complaint is not controverted by answer filed thereto, a sworn verification of the complaint on separate affidavit setting forth the fact shall be sufficient evidence and eliminate the necessity of further evidence as to the fact. The present practice is, of course, to refer to a master or commissioner even routine evidence. After so hearing the evidence he must prepare his report to the court and the matter must be set down for hearing before the facts come to the court for decision. The result is an expensive and dilatory procedure.

The proposed act seeks to remedy this by provisions tending to reduce the cost of foreclosure and to eliminate the delays in our present procedure. Thus it should serve to attract the flow of capital into Illinois mortgage investments and ultimately to benefit the borrower.