#39.200 5/23/77

Memorandum 77-35

Subject: Study 39.200 - Enforcement of Judgments (Comprehensive Statute--Redemption Alternatives)

At the May meeting, the Commission requested the staff to prepare a memorandum providing an overview of the different approaches taken by other states to the problem of depressed prices obtained at judicial sales of real property. Attached to this memorandum as Exhibit 1 is a table summarizing this information. Exhibit 2 is an excerpt from Professor Riensenfeld's casebook which discusses these different approaches. Exhibit 3 contains some provisions concerning power of sale under a mortgage.

BACKGROUND

The Commission has previously decided that the existing scramble system for redemption from execution (and foreclosure) sales of real property is in need of revision if it is to accomplish its purpose to "force the purchaser at the execution sale to bid on the property at a price approximating its fair value." Moore v. Hall, 250 Cal. App. 25, 58 Cal. Rptr. 70 (1967). Although redemption statutes also serve the purpose of giving the debtor a chance to retrieve the property, the Commission has not indicated any strong sentiment toward preserving this function of the redemption statute, particularly since affording the debtor the right to retrieve the property contributes significantly to the sacrifice nature of execution sales of real property. The theory behind permitting other lien creditors to redeem is that the property should be used to satisfy as many creditors as possible.

The arguments for and against redempton, particularly as they relate to foreclosure sales, have been summarized as follows:

> The statutory right of redemption has been both praised and condemned by commentators. It is argued that by allowing redemption from a foreclosure sale the law encourages mortgagors to be less responsible in meeting their installment payments; they know that even if they default they may later regain their property by redeeming it from the purchaser at the sale. A more important objection is that the availability of redemption means that the purchaser at the foreclosure sale gets a defeasible title. This probably discourages outside bidding at the sale since the conditional title is not attractive to investors. Moreover, a period of

redemption allows speculation by those entitled to redeem; they may choose to exercise their right to redeem only if the value of the property rises. It is also argued that allowing the mortgagor to remain in possession during the period of redemption permits him to "milk" the property before surrendering it to the purchaser. On the other side it is argued that the reasons for allowing redemption outweigh the possible abuses. Such purposes include protecting persons who purchased the property subject to the mortgage, allowing time for the mortgagor to refinance and save his property, permitting additional use of the property by a hard-pressed mortgagor, and probably most important, encouraging those who do bid at the sale to bid in at a fair price. By allowing junior lienors to redeem, the statutes permit them to protect the security which they probably would otherwise lose. [Comment, The Statutory Right of Redemption in California, 52 Cal. L. Rev. 846, 848 (1964).]

In light of these general notions about redemption, the Commission has tentatively decided to limit the right of redemption to the judgment debtor and the judgment debtor's successor in interest and to reduce the redemption period to 90 days. However, at the last meeting, the view was expressed that even this approach might not result in generally higher purchase prices at judicial sales. In addition, the complexities of determining who is entitled to what during the redemption period impelled the Commission toward seeking a different approach.

The discussion below considers alternatives to redemption which are utilized in some other states. We do not discuss the variations on the redemption theme since it is assumed that, if redemption is to be retained, it will be in essentially the same form as is set forth in the draft statute.

ALTERNATIVES TO REDEMPTION

No Redemption or Other Protective Measures

As suggested at the last meeting, redemption may have two somewhat contradictory effects--it is assumed that, in the majority of cases, the right of redemption acts to depress the price for which the real property may be sold but, in some cases, the existence of the right of redemption may inhibit even lower sale prices and, where redemption actually takes place, it may be assumed that in some cases it is because the sale price was low. We have not been able to find any studies which demonstrate the actual effect of redemption. The authorities that we

have examined conclude in general terms that the right of redemption functions detrimentally more than it achieves its intended purpose. See, e.g., Madsen, Equitable Considerations of Mortgage Foreclosure and Redemption in Utah: A Need for Remedial Legislation, 1976 Utah L. Rev. 327, 333, 353-356; Madway & Perlman, A Mortgage Foreclosure Primer: Part III Proposals for Change, 8 Clearinghouse Rev. 473, 478-479 (1974); Comment, Statutory Redemption: The Enemy of Home Financing, 28 Wash. L. Rev. 39 (1953). Hence, it might be concluded that the best thing to do is to repeal the redemption laws and let the market do what it will, free of the inhibiting factor of defeasible title. In this connection, it should be noted that as many as 17 states follow this policy. See Exhibit 1.

Repealing the redemption provisions without enacting other protective measures would put real property sales on the same footing as personal property sales. However, considering the value of real property in relation to personal property for the usual individual debtor and remembering that California law has always sought to protect against sacrifice sales of real property on execution and foreclosure, it does not seem advisable to take this course.

Delayed Sale

At the last meeting, Professor Riesenfeld suggested the alternative of delaying the sale for some period such as 90 days after levy, analogous to the three-month delay in the commencement of proceedings under the power of sale provided in a mortgage. See Civil Code § 2924 in Exhibit 3. A similar suggestion was made some years ago:

> It is submitted that the old, established method of tempering the wind to the debtor, namely, by giving him a year in which to redeem, has failed utterly. Its net result has been to make the market unattractive to anyone except the judgment creditor, and it has thus virtually done away with any market other than one absolutely controlled by the creditor. There has been no corresponding benefit to the debtor. Theoretically, he gets time to raise the money with which to redeem; practically, he seldom, if ever, can take advantage of his opportunity. He would have all the benefit he now has if the redemption period were abolished and the sale itself were postponed for one year. He would also have the benefit of a sale in a freer market. . . . The present law,

permitting the debtor to retain possession during the period of redemption and to collect the rents, issues and profits without being accountable to the creditor (until after the period of redemption has expired) is simply a gift to the debtor to which he would not seem to be entitled. It is also submitted that, in many cases, the postponement of the sale would serve no useful purpose, and that where there is no present prospect of a substantial increase in the value of the property nor of the debtor being able to pay the judgment there should be no postponement of sale. [King, The Enforcement of Money Judgments in California, 11 So. Cal. L. Rev. 224, 228-229 (1938) (emphasis added, footnotes omitted).]

The staff favors this approach. The judgment debtor would be permitted to remain in possession of the real property for 90 days after levy of execution. Preferably, we would avoid problems of entitlement to rents and profits although there is a need for a procedure to prevent waste. Compare Civil Code § 2929 in Exhibit 3 (mortgagor not to commit waste). This 90-day period would provide the judgment debtor with time to pay off a smaller judgment by locating other funds or refinancing the real property (which would seem to require a conditional waiver of the priority of the judgment creditor's judgment lien or execution lien). Where the judgment debtor has a homestead exemption, a loan could be obtained on that portion of the value of the real property.

If the judgment debtor is unable to satisfy the lien, the property would be sold. The property should be much more attractive to potential purchasers other than the judgment creditor, however, since it would not be subject to the right of redemption.

This appears to be a relatively novel approach in the area of execution sales of real property. Indiana provides a six-month delay of execution sales coupled with an upset price of two-thirds the appraised value. Ind. Code Ann. § 34-1-37-1, T.R. 69(a) (Burns 1973). This type of scheme could be combined with one or more of those discussed below if it is felt that additional protection is needed where a sale takes place.

Additional Features Designed to Protect Against Sacrifice Sale

Court confirmation. In theory, all sales could be required to be confirmed by the court which would be able to throw out inequitable bids. It appears that the standard applied by courts of equity in the

absence of statutory standards is that the bid must be so grossly inadequate as to shock the conscience or raise a presumption of fraud or unfairness. See Ballentyne v. Smith, 205 U.S. 285 (1907) (bid one-seventh of property's value). Requiring confirmation in every case would obviously be burdensome, and the lack of standards would probably result in little protection and varying results. Accordingly, where court confirmation is required, it is combined with an upset price, advance bid, or antideficiency feature.

Upset price. A procedure may be provided for determining in advance the minimum price for which the property may be sold or for making claims within a particular time after sale that the price paid did not meet the statutory standard. In Ohio, for example, the property must be sold for at least two-thirds of its appraised value which, according to the statute, is to be determined by three freeholders of the vicinity. Ohio Rev. Code Ann. §§ 2329.17, 2329.20 (Page 1954). The sale must be confirmed, at which time the equity of redemption is cut off. Id. §§ 2329.31, 2329.33. In Kansas, which also has a redemption statute, the sheriff is required to make a return to the court which confirms the sale if it is in conformity with law and equity. The court may decline to confirm if the bid is "substantially inadequate" or may fix an upset price. Kan. Stat. § 60-2415(a), (b) (1976). Three other states provide for upset prices. See Exhibit 1. California provides for upset prices at 90 percent of the appraised value in private sales by an executor or administrator. Prob. Code § 784. The drawback of any upset price statute is that it will require an appraisal. A procedure could be devised where the judgment debtor could petition the court for an appraisal which, if it showed that the property had been sold for less than two-thirds of its appraised value (or some other standard), would be grounds for ordering a resale.

Advance bids. The finality of a sale may be continued for a certain length of time so the judgment debtor may seek a buyer who will pay a specified amount over the high bid. In California, a private probate or partition sale will be continued if a bid 10 percent higher on the first $10,000 and five percent higher on additional amounts is obtained.

Code Civ. Proc. §§ 873.730, 873.740; Prob. Code § 785. North Carolina law provides for advance bids on execution sales of 10 percent of the first $1,000, five percent of the excess, with a minimum increase of $25, to be made within 10 days after the sale. The increase must be deposited and an undertaking for the remainder may be required by the clerk. A resale is then ordered and, upon sale, is subject to another advance bid within 10 days. N.C. Gen. Stat. §§ 1-339.64 to 1-339.68 (repl. vol. 1969).

Antideficiency. An antideficiency feature may be applied to execution sales to prevent the judgment debtor from remaining liable where the real property should have been enough to satisfy the judgment. In Pennsylvania, where real property is sold on execution to the judgment creditor and it is not sufficient to satisfy the judgment, the judgment creditor must petition the court within six months of sale to fix the fair market value of the property. Satisfaction of the judgment is granted to the extent of the fair market value. If the petition is not timely filed, the debtor is released from liability. Pa. Stat. Ann. tit. 12, §§ 2621.1-2621.10 (1967). Kansas provides, apparently at the court's discretion, for crediting the fair market value of the property on the judgment in a case where the court holds a hearing to determine value. Kan. Stat. § 60-2415(b) (1976). An antideficiency provision is no protection where the value of the property exceeds the amount of the judgment.

Respectfully submitted,

Stan G. Ulrich
Staff Counsel

EXHIBIT 1

Redemption From Execution Sales and Other Protective Measures by State

Note. The information presented in the following table is derived from S. Riesenfeld, Creditors' Remedies and Debtors' Protection 150-151 (2d ed. 1975) (see Exhibit 2) and G. Osborne, Handbook on the Law of Mortgages § 307 (2d ed. 1970). In some instances, these sources do not purport to be comprehensive. Hence, for example, the list of states providing for upset prices may be incomplete and, accordingly, the last column indicating states without protective measures may be overinclusive.

	Redemption From Foreclosure Sales	Execution Sales								
		Redemption From Execution Sales					Other Protective Measures			
			Type of Redemption Scheme							
		Some Type of Redemption From Execution Sales	Judgment Debtor	Judgment Debtor & Creditors in Order of Priority	Scramble (or Staggered)	Variations	Upset Price	Resale at Higher Bid	Antideficiency in Execution Sales	No Apparent Protective Measures in Execution Sales
Alabama	X	X				X				
Alaska		X			X					
Arizona	X	X		X						
Arkansas	X	X				X				
Calif.	X	X			X					
Colorado	X	X		X						
Conn.										X
Delaware										X
Florida										X
Georgia										X
Hawaii										X
Idaho	X	X			X					
Illinois	X	X				X				
Indiana	X						X			
Iowa	X	X				X				
Kansas	X	X				X	X		X	
Kentucky	X	X	X							
La.										X
Maine	X									X
Maryland										X
Mass.		X	X							
Michigan	X	X			(X)					
Minnesota	X	X		X						
Miss.										X
Missouri	X									X
Montana	X	X			X					
Nebraska										X
Nevada	X	X			X					
N.Hamp.		X	X							
N.Jersey									X	

	Redemption From Foreclosure Sales	Execution Sales								
		Redemption From Execution Sales					Other Protective Measures			
			Type of Redemption Scheme							
		Some Type of Redemption From Execution Sales	Judgment Debtor	Judgment Debtor & Creditors in Order of Priority	Scramble (or Staggered)	Variations	Upset Price	Resale at Higher Bid	Antideficiency in Execution Sales	No Apparent Protective Measures in Execution Sales
N.Mexico	X	X	X				X			
New York										X
No.Caro.								X		
No.Dakota	X	X			X					
Ohio							X			
Oklahoma							X			
Oregon	X	X			X					
Penn.									X	
R.I.										X
So.Caro.								X		
So.Dak.	X	X			X					
Tenn.	X	X				X				
Texas										X
Utah	X	X			X					
Vermont	X	X	X							
Virginia										X
Wash.	X	X			X					
W.Va.										X
Wisconsin		X			(X)					
Wyoming	X	X			(X)					
	26	27	5	3	13	6	3	2	2	17

Memorandum 77-35

EXHIBIT 2

Redemption

[Excerpt from S. Riesenfeld, Creditors' Remedies and Debtors' Protection 149-153 (2d ed. 1975).]

NOTES

1. When the public sale was introduced in the United States as the standard method of collecting a money judgment from the debtor's real estate or of foreclosing a mortgage the problem arose, how to protect the debtor against a sale of the land at a price far below its fair value. In the course of time four methods were developed to that purpose: a) fixing an upset price below which the land cannot be sold, b) granting the debtor and in some jurisdictions, other creditors, the right to repurchase the land from the buyer at the execution or foreclosure sale for the amount bid by him, the so-called statutory right to redeem, c) providing for a further public sale at higher bids, d) prohibiting deficiency judgments for the benefit of creditors to the extent that they bought the land at less than its fair value.

A statute permitting debtors to redeem land sold at execution made a sporadic appearance in Connecticut in 1682. It was followed by a Massachusetts Act of 1713 entitling the debtor to redeem land taken under an execution. At that time, however, execution against land, except land subject to a mortgage, was effected in that jurisdiction by transfer to the creditor, public sales of land being recognized as a general method of execution only as late as the Revision of 1881. See Riesenfeld, Enforcement of Money Judgments in Early American History, 71 Mich.L.Rev. 619, at 700 and 702 (1973). The first redemption statute of the type now in use was enacted in New York Act on April 12, 1820. N.Y. Laws 1820 c. 184. It granted redemption rights to the debtor, his heirs, executors, administrators and grantees and, in the absence of a redemption by them, to lien creditors, with the provision that after redemption by one creditor, other creditors might re-redeem from the redemption. The theory of this arrangement was the idea that the land should be utilized to the greatest extent possible to satisfy all creditors having a lien thereon. A slightly different statute was passed in Tennessee on July 20, 1820. It likewise provided for redemption by creditors in addition to that by the debtor. 2 Laws of Tennessee (Scott) 627 (1821). Redemption statutes were adopted by approximately one-half of the American jurisdictions. No redemption from execution sales is provided in Connecticut, Florida, Indiana (See T.R. 69A), Maryland, Missouri, New Jersey, North Carolina, Oklahoma, Pennsylvania, Texas, Virginia and other jurisdictions not mentioned among the redemption states listed in the following note. New York abolished redemption from execution sale in 1962 with the adoption of C.P.L.R.

Statutes authorizing or requiring the fixing of upset prices exist in a number of states and are in some of them supplementary to redemption provisions. See, e. g., Ind.Stat.Ann. § 34-1-37-1 and T.R. 69A; Kan.Stat. Ann. § 60-2415(h); N.M.Stat.Ann. § 24-2-5; Ohio Rev.Code Ann. § 2329.20, Okl.Stat.Ann. § 762. Provisions for re-auctioning at higher bids are made in North Carolina and South Carolina. N.C.Gen.Stat. §§ 1-339.64 to 1.339.67; S.C.Code, § 10-1770. Anti-deficiency legislation covering execution sales is found in Pennsylvania, P.S. 12 § 2621.1 2621.11.

2. The redemption statutes of the various jurisdictions vary considerably as to the classes of the persons entitled to redeem as well as to the order of redemption in case that redemption rights are afforded to junior encumbrancers in addition to the owner and his successor in title. It is, however, possible to classify the different redemption statutes and to allocate them to certain families. This results from the general tendency of states to borrow acts from other jurisdictions. See Riesenfeld, Law Making and Legislative Precedent in American Legal History, 33 Minn.L. Rev. 103 (1948).

a. In Massachusetts and a number of other states only the debtor, his heirs and assigns or successors are entitled to redeem, e. g., Mass. M.G.L.A. c. 236 § 33; Ky.Rev.Stat. §§ 426.530, 426.540; N.H.Rev.Stat. Ann. §§ 529.26 and 27; N.M.Stat.Ann. § 24 2-21; Vt.Stat.Ann.T. 12 § 2796. In Kentucky the debtor's redemption right is subject to the reach of creditors.

b. In the majority of redemption states the statutory right to redeem is accorded to the original owner or his successor or successors in interest as well as to lienors junior to the lien under which the sale is held. The order in which the various classes of possible redeemers may exercise their right of redemption and the amount that has to be paid on a redemption or a possible re-redemption is the object of great legislative ingenuity.

Two prototypes of redemption statutes can be distinguished which may be designated as "in the order of priority" type and the "scramble" type.

Under the "in order of priority" type of arrangement the owner or his successor has a certain period within which to redeem. If he fails to do so, each junior lienor has a certain number of days for redeeming, the various periods succeeding each other in the order of priority. This form of statute governs in Arizona, Ariz.Rev.Stat.Ann. §§ 12 1281 and 1282; Colorado, Colo.Rev.Stat.Ann. §§ 118-9-2, 118-9-3; and Minnesota, M.S.A. § 550.25.

The prevailing type of redemption statute is the "scramble" type. It originated in the Field Draft of the New York Code of Civil Procedure of 1850, §§ 845-47. This system (though it was not adopted in New York) became the law of Alaska, Alaska Stat. §§ 09.35.210 to 09.35.290; California, West's Ann.Code Civ.Proc. §§ 700a to 707; Idaho, Idaho Code §§ 11-310, 11-401 to 11-407; Montana, Mont.Rev.Code, §§ 5833 to 5841; Nevada, Nev. Rev.Stat. §§ 21.190 to 21.250; North Dakota, N.D.Cent.Code §§ 28-24-01 to 16; Oregon, Or.Rev.Stat. §§ 23.520 to 23.600; South Dakota, (with some modifications), S.D.Comp.Laws Ann. §§ 21-5-1 to 21-5-27. Utah, Utah Rules of Civ.Proc. rule 69(f); Washington, Wash Rev.Code Ann. § 6.24.030, § 6.24.130 et seq. See Comment, The Statutory Right of Redemption in California, 52 Calif.L.Rev. 846 (1964).

New York did not adopt the full scramble system. Until its repeal in 1962 it reserved a specified period exclusively to a redemption by the owner or his successors in interest and only upon its expiration without such redemption an additional period for redemption and re-redemption was accorded to junior lienors under the scramble system. N.Y., McKinney's, Civ.Prac.Act §§ 724-749. This system governs in Michigan, M.C.L.A. §§ 600.6062 to 600.6064; Wisconsin, W.S.A. §§ 272.39 to .54; Wyoming, Wyo. Stat.Ann. §§ 1-480 to 485.

Other jurisdictions have redemption laws that are hybrids or variants of the systems discussed. Statutes of that nature apply in Alabama, Ala. Code of 1958, tit. 7, §§ 727 to 743; Arkansas, Ark.Stat.Ann. §§ 30-440 to 445; Illinois, S.H.A. c. 77, § 18-31, as amended in 1973; Iowa, I.C.A. § 628.1 to 628.25; Kansas, Kan.Stat.Ann. § 2414, discussed by Hiatt, Right of Redemption of Real Property in Kansas, 10 Wash.L.J. 286 (1971); Kentucky, Rev.Stat. §§ 426.220-426.240; Tennessee, Tenn.Code Ann. §§ 64-801 to 815.

3. Despite many variations in detail there exist a number of principles that are common to the majority of the redemption statutes. The most basic one is the rule that redemption by the owner or his successor in interest cuts off all further redemptions by lienors or creditors. Fite v. Wood, 194 Tenn. 308, 250 S.W.2d 545 (1952). In the preponderant majority redemption by the owner or his successor in interest annuls the sale with the result that liens junior to those under which the sale was held reattach, while redemption by a junior encumbrancer subrogates the redeeming party to the rights of the purchaser or a prior redemptioner. This result usually is based on an express statutory provision terminating the effect of the sale upon redemption by the owner and a statutory or judicial extension of this result to redemption by a successor. Provisions of this type are, for example, Cal., West's Ann.Code Civ.Proc., § 703, Colo.Rev.Stat. § 118-9-5; Idaho Code § 11-403; Ill., Smith-Hurd Ann.Stat. c. 77, § 18; Mich.Comp.Laws Ann. § 600.6062(3); Minn.Stat.Ann. §§ 550.27, 580.27; Mont.Rev.Codes Ann. § 93-5836(2); Nev.Rev.Stat. § 21.220(5); N.D. Century Code Ann., § 28-24-06; Ore.Rev.Stat. § 23.660; S.D.Comp. Laws § 21-52-24; Utah, R.C.P. 69 f (5); Wash.Rev.Code, § 6.24.160; Wis.Stat. Ann. § 272.43. In some jurisdictions the same result is implied from other provisions of the redemption law. For cases invoking the rule see, Upchurch v. West, 234 Ala. 604, 609, 176 So. 186, 190 (1937); Call v. Thunderbird, 58 C.2d 542, 375 P.2d 169, 25 Cal.Rptr. 265 (1962); Hack v. Snow, 338 Ill. 28, 169 N.E. 819 (1929); Powers v. Sherry, 115 Minn. 290, 132 N.W. 210 (1911); Dipple v. Neville, 82 Mont. 280, 267 Pac. 214 (1928); Rist v. Anderson, 70 S.D. 579, 19 N.W.2d 833 (1945); Wiedner v. Smith, 206 Wis. 438, 240 N.W. 367 (1932). Different results are reached in Iowa and Kansas because of a different structure of, or a specific provision in, the applicable redemption law. Thus in Iowa a redeeming successor takes free and clear of all junior encumbrances, although junior judgment liens (as distinguished from junior mortgages) will reattach upon redemption by the judgment debtor himself, Paulsen v. Jensen, 209 Iowa 453, 228 N.W. 357 (1929); Andersen v. Renshaw, 229 Iowa 93, 294 N.W. 274 (1940), criticized in Note, Iowa Statutory Redemption after Mortgage Foreclosure, 35 Iowa L.Rev. 72, 77 (1950). In Kansas redemption by either the owner or a successor will not entail reattachment of junior encumbrances by virtue of a special provision to that effect enacted in 1893, now Kan.Stat.Ann. § 60-2414(c), construed in Johnston v. Wear, 110 Kan. 237, 204 Pac. 141 (1922).

4. Great doubts prevail with respect to the status of an unpaid portion of the lien under which the sale was held. Is it deemed to be a junior lien during the redemption period, entitling the creditor to redeem from his own sale? Does it reattach upon redemption by the owner or by a grantee to whom the owner transferred his interest before the sale or during the redemption period? The answer to these questions determines the advantages or disadvantages of a so-called "underbid," see also Crocker, Beneficiaries Underbid—A Neglected Tool, 44 L.A.B. Bull. 292 (1969), dealing with sales under powers.

a) The majority of jurisdictions deny a creditor the right to redeem from his own execution or foreclosure sale, chiefly because the applicable statute grants the right to redeem only to lien creditors junior to the lien under which the sale is had or a specific mandate to that effect, such as Wis.Stat.Ann. § 272.48(5). San Jose Water Co. v. Lyndon, 124 Cal. 518, 57 Pac. 481 (1899); Clayton v. Ellis, 50 Iowa 590 (1879); Burwell & Morford v. Seattle Plumbing Supply Co., 14 Wash.2d 537, 128 P.2d 859 (1936); contra, First Nat'l Bank v. Elliott, 125 Ala. 646, 27 So. 7 (1899); Posey v. Pressley, 60 Ala. 243 (1877), relying on Ala.Code, Tit. 7, §§ 735, 738; Crowder v. Scott State Bank, 365 Ill. 88, 5 N.E.2d 387, 108 A.L.R. 990, 36 (1936).

b) If the judgment debtor himself redeems, it has been held or stated in dicta that the unsatisfied portion of the judgment will reattach despite the fact that a sale was held thereunder, Simpson v. Castle, 52 Cal. 644 (1878); Kay v. United Mortgage Co., 466 P.2d 848 (Nev.1970); Call v. Jeremiah, 246 Ore. 568, 425 P.2d 502 (1967);

Damascus Milk Co. v. Morris, 1 Wash.App. 501, 463 P.2d 501 (1969). A different result is dictated in Iowa by Iowa Code Ann. § 628.3. There is, however, a question whether the reattachment preserves the old priority or is subordinate to pre-existing junior encumbrances. The latter result would parallel the status of a deficiency judgment after a mortgage foreclosure, see Johnson v. Zahn, 380 Ill. 320, 324, 44 N.E.2d 15, 18 (1942); Ulrich v. Lincoln Realty Co., 180 Ore. 380, 175 P.2d 149 (1946).

c) Conversely, if the debtor has transferred his interest either before the execution sale or during the redemption period and the grantee redeems, the authorities are in conflict as to the status of the unpaid portion of the judgment. In a number of jurisdictions it has been held that the judgment is not again a lien, Moore v. Hall, 250 C.A.2d 25, 58 Cal.Rptr. 70 (1967); Fry v. Bihr, 6 C.A.3d 248, 85 Cal Rptr. 742 (1970); Kaye v. United Mortgage Co., 466 P.2d 848 (Nev. 1970), contra, the text case and Flanders v. Aumack, 32 Or. 19, 51 Pac. 447 (1897). It is, however, recognized in Oregon and Washington as elsewhere that neither the unsatisfied portion of a foreclosed mortgage nor a deficiency judgment against the mortgagor recorded after a transfer by him of his interest would constitute a lien if the grantee redeems, Call v. Jeremiah, 246 Ore. 568, 425 P.2d 502 (1967); Damascus Milk Co. v. Morris, 1 Wash.App. 501, 463 P.2d 212 (1969); Johnson v. Zahn, 380 Ill. 320 (1942); Gaskin v. Smith, 375 Ill. 59, 30 N.E.2d 624 (1940).

5. The legal nature of the remaining rights of a debtor whose real property has been sold at an execution sale as well as of the rights of the purchaser thereof during the redemption period has likewise been the subject of judicial conflict. A number of courts have held that if the debtor had legal title in fee the execution purchaser acquires a fee simple defeasible, while the debtor retains a reversionary interest. Others have ruled that the purchaser acquires only the execution creditor's lien which will ripen into title if there is no redemption. The characterization may, for example, be important for the determination of the capacity in which an execution purchaser, prior to the expiration of the redemption period running on his acquisition, may redeem from a subsequent execution or foreclosure sale under a prior lien or for the question whether creditors of the debtor may acquire judicial liens on the interest left in him after the execution sale for the purpose of joining the ranks of possible redemptioners. Thus in some jurisdictions a purchaser at an execution sale is considered to be a successor in interest whose redemption annuls a different execution sale under a prior lien even though his interest itself is still subject to redemption, Pollard v. Harlow, 139 Cal. 390, 71 Pac. 454 (1903), Bateman v. Kellogg, 59 Cal.App. 469, 211 Pac. 46 (1922); Montgomery Lumber Co. v. Tuttle, 51 S.D. 596, 216 N.W. 194 (1927), while others give him only the redemption rights of a lien creditor, Bates v. Mallina, 223 Iowa 1000, 274 N.W. 117 (1937); Kendig v. McCall, 135 Iowa 180, 110 N.W. 458 (1907); Bagley v. McCarthy Bros. Co., 96 Minn. 286, 107 N.W. 7 (1905); Parke v. Hush, 29 Minn. 434, 13 N.W. 668 (1882); Mich.Comp.Laws Ann. § 600.6063(2). Conversely, in many jurisdictions the interest left in the former owner during the redemption period is considered an interest in real property to which judgment liens may attach with the result that the judgment creditor may redeem from the sale as lienor, Clark v. Cain, 46 Cal.2d 386, 295 P.2d 401, 58 A.L.R.2d 460 (1956); Pierce v. White, 204 Iowa 1116, 216 N.W. 764 (1927) (involving Iowa Code Ann. § 628.5); Sigler v. Phares, 106 Kan. 116, 181 Pac. 628 (1919). Yet, despite the creditors' power to subject the owner's subsisting rights to judgment liens for purposes of securing redemption rights as lien creditors, in Iowa and Kansas the owner's redemption rights may not be levied upon and sold on execution, Union Cent. Life Ins. Co. of Cincinnati v. Eggers, 212 Iowa 1355, 237 N.W. 240 (1931); Sigler v. Phares, supra, (construing Kan.Stat.Ann. § 60-2414(k)

and (o) 1; Southwest State Bank v. Quinn, 198 Kan. 359, 424 P.2d 620 (1967) (holding that § 60-2414(k) does not bar passage of the redemption rights of a corporate bankrupt to the trustee in bankruptcy). In Alabama the owner's right to redeem is likewise assignable, but not subject to levy and sale on execution or attachment, although creditors who become such during the redemption period are entitled to redeem. Code of Ala., Tit. 7, §§ 727, 735, 743.

Memorandum 77-35

EXHIBIT 3

[Power of Sale, Civil Code §§ 2924, 2924c, 2929]

§ 2924. Transfer as security deemed mortgage or pledge; power of sale; restrictions on exercise; notice of default and election to sell; recordation; waiting period; notice of sale; evidence of compliance

Every transfer of an interest in property, other than in trust, made only as a security for the performance of another act, is to be deemed a mortgage, except when in the case of personal property it is accompanied by actual change of possession, in which case it is to be deemed a pledge. Where, by a mortgage created after July 27, 1917, of any estate in real property, other than an estate at will or for years, less than two, or in any transfer in trust made after July 27, 1917, of a like estate to secure the performance of an obligation, a power of sale is conferred upon the mortgagee, trustee, or any other person, to be exercised after a breach of the obligation for which such mortgage or transfer is a security, such power shall not be exercised except where such mortgage or transfer is made pursuant to an order, judgment, or decree of a court of record, or to secure the payment of bonds or other evidences of indebtedness authorized or permitted to be issued by the Commissioner of Corporations, or is made by a public utility subject to the provisions of the Public Utilities Act, until (a) the trustee, mortgagee, or beneficiary, shall first file for record, in the office of the recorder of each county wherein the mortgaged or trust property or some part or parcel thereof is situated, a notice of default, identifying the mortgage or deed of trust by stating the name or names of the trustor or trustors and giving the book and page where the same is recorded or a description of the mortgaged or trust property and containing a statement that a breach of the obligation for which such mortgage or transfer in trust is security has occurred, and setting forth the nature of such breach and of his election to sell or cause to be sold such property to satisfy the obligation, and where the default is curable pursuant to Section 2924c, containing the statement specified in paragraph (1) of subdivision (b) of Section 2924c; (b) not less than three months shall thereafter elapse; and (c) after the lapse of the three months the mortgagee, trustee or other person authorized to make the sale shall give notice of sale, stating the time and place thereof, in the manner and for a time not less than that set forth in Section 2924f. A recital in the deed executed pursuant to the power of sale of compliance with all requirements of law regarding the mailing of copies of notices for which requests have been recorded or the publication of a copy of the notice of default or the personal delivery of the copy of the notice of default or the posting of copies of the notice of sale or the publication of a copy thereof shall constitute prima facie evidence of compliance with such requirements and conclusive evidence thereof in favor of bona fide purchasers and encumbrancers for value and without notice.

§ 2924c. Cure of default; payment of arrearages, costs and fees; effect upon acceleration; notice of default; statement

(a) Whenever all or a portion of the principal sum of any obligation secured by deed of trust or mortgage on real property hereafter executed has, prior to the maturity date fixed in such obligation, become due or been declared due by reason of default in payment of interest or of any installment of principal, or by reason of failure of trustor or mortgagor to pay, in accordance with the terms of such obligation or of such deed of trust or mortgage, taxes, assessments, premiums for insurance or advances made by beneficiary or mortgagee in accordance with the terms of such obligation or of such deed of trust or mortgage, the trustor or mortgagor or his successor in interest in the mortgaged or trust property or any part thereof, or any beneficiary under a subordinate deed of trust or any other person having a subordinate lien or encumbrance of record thereon, at any time within three months of the recording of the notice of default under such deed of trust or mortgage, if the power of sale therein is to be exercised, or, otherwise at any time prior to entry of the decree of foreclosure, may pay to the beneficiary or the mortgagee or their successors in interest, respectively, the entire amount then due under the terms of such deed of trust or mortgage and the obligation secured thereby (including costs and expenses actually incurred in enforcing the terms of such obligation, deed of trust or mortgage, and trustee's or attorney's fees actually incurred not exceeding one hundred dollars ($100) in case of a mortgage and fifty dollars ($50) in case of a deed of trust or one-half of 1 percent of the entire unpaid principal sum secured, whichever is greater) other than such portion of principal as would not then be due had no default occurred, and thereby cure the default theretofore existing, and thereupon, all proceedings theretofore had or instituted shall be dismissed or discontinued and the obligation and deed of trust or mortgage shall be reinstated and shall be and remain in force and effect, the same as if no such acceleration had occurred. The provisions of this section shall not apply to bonds or other evidences of indebtedness authorized or permitted to be issued by the Commissioner of Corporations or made by a public utility subject to the provisions of the Public Utilities Code.

(b) (1) The notice, of any default described in this section, recorded pursuant to Section 2924, and mailed to any person pursuant to Section 2924b, shall contain the following statement, printed or typed thereon:

NOTICE

You may have the right to cure the default described herein and reinstate the mortgage or deed of trust. Section 2924c of the Civil Code permits certain defaults to be cured upon the payment of the amounts required by that section without requiring payment of that portion of principal and interest which would not be due had no default occurred. Where reinstatement is possible, if the default is not cured within three months following the recording of this notice, the right of reinstatement will terminate and the property may be sold.

To determine if reinstatement is possible and the amount, if any, necessary to cure the default, contact the beneficiary or mortgagee or their successors in interest, whose name and address as of the date of this notice is _____ at _____.
(name) (address)

(2) Any failure to comply with the provisions of this subdivision shall not affect the validity of a sale in favor of a bona fide purchaser or the rights of an encumbrancer for value and without notice.

§ 2929. Waste

WASTE. No person whose interest is subject to the lien of a mortgage may do any act which will substantially impair the mortgagee's security.