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THE TRUST DEED ACT IN WASHINGTON

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By enacting the Deed of Trust Act, the author suggests Washington has taken one step away from its archaic real property security procedures. He explains the mechanics of trust deed financing and how to best utilize the trust deed. In addition, he points out certain technicalities and pitfalls inherent in the Deed of Trust Act and suggests amendments still needed to fully implement trust deed financing.

The 1965 legislature took a major step away from Washington's nineteenth century real estate financing, by passing the Deed of Trust Act[1] an act designed to supplement the existing foreclosure procedure of the trust deed. Although the trust deed has long existed as a security device in Washington,[2] the only means of realization previously available was to foreclose the trust deed as a mortgage. Unfortunately, Washington's mortgage foreclosure laws and redemption rights are of another era,[3] complicated and inconsistent with the needs of modern real estate financing.[4]

The basic shortcomings of the existing mortgage foreclosure pro-

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[1] Wash. Sess. Laws 1965, ch. 74. A similar act had been introduced unsuccessfully in the 1955, 1957, 1959, 1961, and 1963 sessions of the Washington legislature. See Shattuck, *Security Transactions*, 36 WASH. L. REV. 303, 309 (1961). Opponents of the Deed of Trust Act used arguments which had presumably been rebutted a century earlier. Compare the forward-looking attitude of a nineteenth-century court in Taylor v. Stearns, 13 Gratt 244, 278 (Va. 1868):

> What is a deed of trust? It is a form of security which has, in our practice, superseded the mortgage and doubtless for the very reason that it does not require the intervention of the courts. The introduction of trustees as impartial agents of the creditor and debtor, admits of a covenant, cheap and speedy execution of the trust, and involves none of the expenses and delays attendant upon mortgages.
>
> At any early period it met with some resistance from the court and the bar, though feeble and ineffectual. It was depreciated as an engine of oppression in the hands of the creditor. It was denounced as a *pocket judgment*. . . . It is now a favorite security for the payment of money, closely interwoven with the transactions of business, and firmly established by the practice of the county and the sanction of the courts. It has, doubtless, aided credit, facilitated the collection of debts, and saved to the debtor the costs of legal proceedings.

[2] Straus v. Wilsonian Inv. Co., 177 Wash. 167, 31 P.2d 516 (1934); Morrill v. Title Guar. & Sur. Co., 94 Wash. 258, 162 Pac. 360 (1917); Clay v. Selah Valley Irrigation Co., 14 Wash. 543, 45 Pac. 141 (1896).

[3] WASH. REV. CODE §§ 6.24.130-220 (1956). These provisions have been in effect in Washington since 1899, Wash. Sess. Laws 1899, ch. 53 §§ 7-15.

[4] See Comment, *Statutory Redemption: The Enemy of Home Financing*, 28 WASH. L. REV. 39 (1953).

cedure are the time-consuming judicial process[5] and a judicial sale which does not vest title in the purchaser.[6] Thus, upon default, the lender normally does not realize on his security interest in less than fifteen months. Such an inconvenience is unattractive to lenders and at times has made home financing in Washington extremely difficult.[7] The foreclosure laws that were designed to protect the nineteenth century borrower served to hinder him in the twentieth century; one writer points out: "These laws . . . serve only to impose additional costs on the borrower by making funds more difficult to obtain."[8]

Recent legislative attempts to remedy this situation[9] have been unsuccessful because they did not correct these basic shortcomings. The Deed of Trust Act supplements[10] the time-consuming judicial foreclosure procedure by providing as alternative private sale[11] which re-

[5] See SHATTUCK, REVISED WASHINGTON MATERIALS ON PROPERTY SECURITY, § 13-1 (1964).

[6] A sheriff's certificate of purchase gives the purchaser an inchoate interest which at best could ripen into title at the expiration of the one year redemption period. *In re* Fourth Avenue South, 18 Wn. 2d 167, 138 P.2d 667 (1943); Bonded Adjustment Co. v. Helgerson, 188 Wash. 176, 61 P.2d 1267 (1936); Atwood v. McGrath, 137 Wash. 400, 242 Pac. 648 (1926); Ford v. Nokomis State Bank, 135 Wash. 37, 237 Pac. 314 (1925); Cochran v. Cochran, 114 Wash. 499, 195 Pac. 224, 198 Pac. 270 (1921); Singly v. Warren, 18 Wash. 434, 51 Pac. 1066 (1898). *But see* Schweppe, *Interest Acquired by Purchaser at Foreclosure or Execution Sale,* 5 WASH. L. REV. 105 (1930), in which the author cites all cases prior to the *Atwood* case, *supra,* in an attempt to prove that the purchaser acquires more than an inchoate estate. However, see Cochran v. Cochran, 114 Wash. 499, 503, 195 Pac. 224, 225 (1921) where the court said:

> It has become the well settled law of this state that a mortgage, unlike a mortgage at common law, does not vest title in the mortgagee but only creates a lien upon the land in favor of the mortgagee as against the interest of the mortgagor; and that a foreclosure sale of the land looking to the satisfaction of the mortgage debt creates no greater interest in the land in the purchaser at such sale, during the period allowed by statute within which the mortgagor may redeem. In other words, the mortgagor is not, by such sale, divested of his title to the land prior to the expiration of the redemption period, and can even then be divested of his title only upon his failure to redeem during that period.

[7] Faced with a choice between lending in a state with archaic property security laws such as Washington and a state with modern laws permitting ready realization, investors would naturally choose the latter. It is not surprising that California, with modern realization procedures, was securing four times as much real estate financing proportionately as Washington in periods of "tight money." Based on an unpublished study by William Branigan of the Seattle Bar.

[8] Blinn, *Modern Foreclosure Laws,* The Mortgage Banker, April 1965, p. 24.

[9] *E.g.,* by reducing the statutory redemption period to eight months where the mortgage contained a nonagricultural proviso and when the right to a deficiency judgment was waived, Wash. Sess. Laws 1961, ch. 196. This provision was criticized as inadequate in 36 WASH. L. REV. 309, 310 (1961). Eliminating redemption rights on abandoned property, Wash. Sess. Laws 1963, ch. 34, § 3, WASH. REV. CODE § 61.12.093 (1963), has been considered incomplete, 38 WASH. L. REV. 492 (1963). However, the latter proviso was corrected by Wash. Sess. Laws 1965, ch. 80.

[10] The act does not supersede or repeal any provisions relating to the foreclosure of real property security interests.

[11] Wash. Sess. Laws 1965, ch. 74, § 4.

sults in substantial savings of time.[12] Moreover, there is no statutory redemption period following the trustee's sale so the purchaser gets title at once.[13] Thus, the Deed of Trust Act avoids the basic shortcomings of the judicial foreclosure procedure.

There is, however, one sacrifice which the lender must make in utilizing the private sale provision of the act—he waives the right to a deficiency judgment.[14] The right to a deficiency judgment continues to be available to the lender who elects to foreclose under the existing judicial procedure.[15]

I. THE TRUST DEED

The trust deed is a security device and is often considered a mortgage in legal effect.[16] It is a three-party transaction in which the borrower (grantor) deeds the property to a trustee who holds the deed as security for the lender (beneficiary).[17] The deed must contain a power of sale[18] and a statement that the secured property is not used princi-

[12] The private sale may take place six months after default by the borrower, Wash. Sess. Laws 1965, ch. 74, § 4 (6).

[13] Wash. Sess. Laws 1965, ch. 74, § 5. The statutory redemptions period is to be distinguished from the equity of redemption which exists during the period between the default and the trustee's sale. Burwell & Morford v. Seattle Plumbing Supply Co., 14 Wn. 2d 537, 128 P.2d 859 (1942). Under judicial sale, the statutory redemption period is either eight months or one year, WASH. REV. CODE § 6.24.140 (1961).

[14] Wash. Sess. Laws 1965, ch. 74, § 10. The rationale of denying a deficiency judgment to the lender upon his election to foreclose under the act's private sale provisions is subject to criticism. In Lessard v. Smith, 45 Wn. 2d 473, 275 P.2d 730 (1954), the Washington court denied the deficiency judgment right to a mortgagee who elected to use the notice and sale provision of the chattel mortgage statute, WASH. REV. CODE ch. 61.08 (1961). The *Lessard* court was moved by policy considerations—such a sale "could bind the debtor to the results of a collusive sale, or to one too speedily made, or to one completed under the shadow of distress." 45 Wn. 2d at 476, 275 P.2d at 732 However, these policy considerations do not seem applicable to the trustee's sale because of the strict statutory control over the sale. Thus, the legislature has perpetuated a distinction which should not be relevant. Apparently it was felt that the waiver of the right to a deficiency judgment is part of the "price" the lender must pay to elect to use the private sale provisions. Montana's statute is similar although the alternatives are not so clearly expressed. MONT. REV. CODES ANN. § 52-414 (Supp. 1965). Neither Oregon nor Idaho makes such a distinction. Oregon denies the right to a deficiency in a trust deed whether foreclosed through judicial sale or private sale, ORE. REV. STAT. § 86.770(2) (1959), whereas Idaho permits a deficiency independent of the means of realization, IDAHO CODE ANN. § 45-1512 (1957).

[15] Wash. Sess. Laws 1965, ch. 74, § 10. See WASH. REV. CODE §§ 61.12.070-.080 (1958), as amended.

[16] Morrill v. Title Guar. & Sur. Co., 94 Wash. 258, 162 Pac. 360 (1917). See also 1 JONES, MORTGAGES § 77 (8th ed. 1928) and 3 JONES, MORTGAGES § 2290 (8th ed. 1928). For cases indicating that there is no real difference between a trust deed and mortgage, see Shillaber v. Robinson, 97 U.S. 68 (1877); Lancaster Sec. Inv. Corp. v. Kessler, 159 Cal. App. 2d 649, 324 P.2d 634 (1958); Baker v. Dawson, 216 Md. 478, 141 A.2d 157 (1958); Sims v. Grubb, 75 Nev. 173, 336 P.2d 759 (1959); Lucky Homes, Inc. v. Tarrant Sav. Ass'n 379 S.W.2d 386 (Tex. Civ. App. 1964); Dall v. Lindsay, 237 S.W.2d 1006 (Tex. Civ. App. 1951).

[17] See Appendix B, at 108.

[18] Wash. Sess. Laws 1965, ch. 74, § 3 (1).

pally for agricultural or farming purposes,[19] and must be recorded in the county where the property is situated.[20] Upon satisfaction of the obligation, the lender (beneficiary) in writing, instructs the trustee to execute a deed reconveying the property to the borrower (grantor).[21] Upon default, the lender has an election. He may: (1) where the trust deed secures a note, sue on the note;[22] (2) foreclose under existing mortgage foreclosure proceedings;[23] or (3) foreclose pursuant to the act.[24]

Upon an election to foreclose under the act, the trustee must record notice of default with the county auditor at least 180 days before the private sale.[25] What must appear on the notice to be recorded is explicitly set forth in the statute.[26]

Once the required notice is duly recorded and at least 120 days before the sale, a copy of the notice must be sent by certified or registered mail to each person having an interest, lien, or claim of record in the property.[27] Further, at that time, a copy of the notice must

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[19] Wash. Sess. Laws 1965, ch. 74, § 3 (2).

[20] Wash. Sess. Laws 1965, ch. 74, § 3 (5).

[21] Wash. Sess. Laws 1965, ch. 74, § 11.

[22] Wash. Sess. Laws 1965, ch. 74 § 10. Under WASH. REV. CODE § 61.12.120 (1958), this election would bar a contemporaneous foreclosure of the trust deed as a mortgage.

[23] Wash. Sess. Laws 1965, ch. 74, § 10. WASH. REV. CODE ch. 61.12 (1958). Undoubtedly, this will occur in many instances, particularly where there are many liens and complications clouding the status of title. Since questions of title are conclusively resolved in judicial foreclosure, title companies will persist in demanding judicial foreclosure as a premise to insuring title.

[24] Wash. Sess. Laws 1965, ch. 74, § 4. See Appendix C, at 108.

[25] Wash. Sess. Laws 1965, ch. 74, § 4(1). As originally proposed in 1955, the act provided only 90 days notice, House Bill No. 303, 1955. The act as passed by the House required 120 days, but a Senate amendment increased this period to 180 days. This extension of the notice period is unnecessary and unwise. Indeed, it may be to the disadvantage of the borrower because the lender is more apt to record notice of default in order to start the 180 day period running. This will subject borrowers to public scrutiny upon an incidental default. Since our present system contains no provision for removing the recorded default upon satisfaction, the stigma will continue on the public record. Perhaps a procedure to remove such defaults from the record upon satisfaction should be enacted. However, it is suggested that the best solution is that employed by our neighbor states—shorten the 180 day period to 120 days. IDAHO CODE ANN. § 45-1506 (Supp. 1965); MONT. REV. CODES ANN. § 52-409 (Supp. 1965); ORE. REV. STAT. § 86.740 (1961). Oregon's experience with the notice provisions is indeed worthy of special attention. As originally introduced, only 90 days notice was required; however, this was raised to 180 days in the act as passed in 1959. Ore. Laws 1959, ch. 625, § 6. In 1961, the legislature reduced the notice period to 120 days, ORE. REV. STAT. § 86.740 (1961).

[26] Wash. Sess. Laws 1965, ch. 74, § 4(2) provides:

> The notice aforesaid shall indicate the names of the grantor, trustee and beneficiary of the deed of trust, the description of the property as contained in the deed of trust, the book and page of the books of record wherein the deed of trust is recorded, the default for which the foreclosure is made, the amount or amounts in arrears if a default is for failure to make payment, the sum owing on the obligation secured by the deed of trust, and the time and place of sale.

[27] Wash. Sess. Laws 1965, ch. 74, § 4(1).

be posted on the premises or served on the occupants of the premises.[28] Apparently this notice provision is similar to *lis pendens*[29] cutting off all subsequent lienors, encumbrancers, or grantees. It is therefore incumbent upon all lienors or encumbrancers to properly record their interest, including their address. Otherwise they may well find their rights terminated without notice.

The operation of this notice provision will be of particular concern to certain lienholders. A federal tax lien, subsequent in time to the trust deed, could be eliminated by private sale without notice to the government if circumstances so warrant.[30] The mechanics lien[31] can also be cut off without notice under certain circumstances. This lien relates back to the date work commenced, but if the lien itself does not arise until after the 120 day notice was given, the lienor would not be entitled to notice.[32] Since the lienor has eight months to commence his action,[33] whereas the trustee's sale period is six months, the lienor could well find himself without any property upon which to foreclose.[34]

Another possible complication is the notice provision's requirement that the address of each lienor entitled to notice be stated in the recorded instrument.[35] The present statutory lien form does not provide for the lienor's address.[36] As a practical matter, such liens are usually of short duration and the address problem should not be serious in future liens, *i.e.*, the form can be modified to include the lienor's address. However, judgment liens run for six years[37] and the lienor's address is rarely included. Thus, for want of an address, judgment lienors would not receive the statutory notice.[38] The statute also provides for notice

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[28] *Ibid.*

[29] WASH. REV. CODE §§ 4.28.160.

[30] United States v. Brosnan, 363 U.S. 237 (1960), 12 SYRACUSE L. REV. 273 (1960); 14 VAND. L. REV. 671 (1961); 63 W. VA. L. REV. 97 (1960).

[31] WASH. REV. CODE § 60.04.050 (1959).

[32] Under Wash. Sess. Laws 1965, ch. 74, § 4(1), notice is sent to liens "of record at the time the notice is recorded."

[33] WASH. REV. CODE § 60.04.100 (1959).

[34] In this respect, the lienor's predicament is analagous to a lien on a vendee's interest, *i.e.*, his interest is dependent upon the vendee's interest. Newell v. Vervaeke, 189 Wash. 144, 63 P.2d 488 (1937); Iliff v. Forssell, 7 Wash. 225, 34 Pac. 928 (1893); Mentzer v. Peters, 6 Wash. 540, 33 Pac. 1078 (1893). Compare WASH. REV. CODE § 60.04.050 (1959).

[35] Wash. Sess. Laws 1965, ch. 74, § 4(1) requires "the address of such person entitled to notice . . . [to be] stated in the recorded instrument evidencing his interest, lien or claim . . . [unless it] is otherwise known to the trustee." Compare ORE. REV. STAT. § 86.740 (1961) and IDAHO CODE ANN. § 45-1506 (Supp. 1965) which do not require the address.

[36] The form set forth in WASH. REV. CODE § 60.06.060 (1959) does not provide space for the lienor's address.

[37] WASH. REV. CODE § 4.56.190 (1956).

[38] Wash. Sess. Laws 1965, ch. 74, § 4(1).

by publication,[39] but publication affords scant protection for actual notice.[40]

II. The Trustee's Sale

The private sale is to be conducted by the trustee "at the place and during the hours directed by statute for the conduct of sales of real estate at execution."[41] This is between 9:00 a.m. and 4:00 p.m. on Friday at the courthouse door.[42] Such a limitation is unrealistic and may lead to chaotic scenes in metropolitan areas. Our neighbor states wisely permit more flexibility in time and place of the private sale.[43] Unfortunately, the trustee, unlike the sheriff,[44] has no discretionary power to postpone the sale.[45] Such a power could be advantageous to both the creditor and the debtor for a variety of reasons:[46] inclement weather may make Friday afternoon undesirable; further time might enable another party to assume the debtor's obligation; the debtor might be able to cure his default; and, of course, more favorable market conditions may be available at a future date. Consequently, it is strongly recommended that the trustee be given power to postpone the sale.[47]

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[39] Wash. Sess. Laws 1965, ch. 74, § 4(3).

[40] Walker v. Hutchinson City, 352 U.S. 112 (1956); Mullane v. Central Hanover Bank & Trust Co., 339 U.S. 306 (1949).

[41] Wash. Sess. Laws 1965, ch. 74, § 4(4).

[42] Wash. Rev. Code § 6.24.010 (1956).

[43] Montana ignores the problems, but by implication gives the trustee complete discretion, Mont. Rev. Codes Ann. § 52-407 (Supp. 1965). Compare Ore. Rev. Stat. Ann. § 86.745(6) (1963) which provides:

> The date, time and place of the sale, which shall be held at a designated time after 9:00 a.m. and before 4:00 p.m. Pacific Standard Time and at a designated place in the county or one of the counties where the property is situated.

Idaho Code Ann. § 45-1506(4)(f) is substantially similar to the Oregon provision.

[44] Wash. Rev. Code § 6.24.040 (1956). Some courts have implied such a power as inherent in private sale, Armille v. Lovett 100 N.H. 203, 122 A.2d 265 (1956); Perdue v. Davis, 176 Va. 102, 10 S.E.2d 558 (1940). See also Williams v. Continental Sec. Corp., 22 Wn. 2d 1, 153 P.2d 847 (1944). Other courts have upheld this power when it is within the trustee's rights under the trust deed instrument. Cobb v. California Bank, 6 Cal. 2d 389, 57 P.2d 924 (1936); McLaughlin v. Mutual Bldg. & Loan Ass'n, 57 Nev. 181, 60 P.2d 272 (1936). Indeed, the trustee has been held to have a duty to postpone the sale in certain circumstances, irrespective of his contractual rights. Engelbertson v. Loan & Bldg. Ass'n, 6 Cal. 2d 477, 58 P.2d 647 (1936); Chartrand v. Newton Trust Co., 296 Mass. 317, 5 N.E.2d 421 (1936); Lange v. McIntosh, 340 Mo. 247, 100 S.W.2d 456 (1937).

[45] Montana gives the trustee power to postpone the sale, Mont. Rev. Codes Ann. § 52-409(2) (1963).

[46] See, *e.g.*, Williams v. Continental Sec. Corp., 22 Wn. 2d 1, 153 P.2d 847 (1944).

[47] Of course, proper safeguards are recommended to prevent abuse of this power; see, *e.g.*, Wash. Rev. Code § 6.24.010 (1961). As to whether trustee would be under duty to postpone, see Engelbertson v. Loan & Bldg. Ass'n, 6 Cal. 2d 477, 58 P.2d 647 (1936); Chartrand v. Newton Trust Co., 296 Mass. 317, 5 N.E.2d 421 (1936); Lange v. McIntosh, 340 Mo. 247, 100 S.W.2d 456 (1937); Perdue v. Davis, 176 Va. 102, 10 S.E.2d 588 (1940).

The beneficiary or any person other than the trustee may bid at the trustee's sale.[48] The trustee may sell the property in gross or in parcels.[49] The sheriff has a similar power in judicial sales[50] which has been held discretionary.[51] Thus, this trustee's option should pose no problem, the trustee being able to select the appropriate manner of sale at his discretion. The sale proceeds are first applied to the expenses of sale,[52] then to the obligation secured by the trust deed,[53] with any balance remaining to be "distributed to the persons entitled thereto."[54]

The act also provides that the trustee's deed:

> shall recite the facts showing that the sale was conducted in compliance with all of the requirements of this act and of the deed of trust, which recital shall be prima facie evidence of such compliance and conclusive evidence thereof in favor of bona fide purchasers and encumbrancers for value.[55]

The Washington court construed a similar provision of a California trust deed in *Johnson v. Johnson*[56] as follows:

> We think that the purpose of the provision in the trust instrument, that the recitals contained in the deed of sale should be conclusive proof of the truthfulness thereof and that such deeds should be conclusive against the trustor and all other persons undoubtedly was to protect innocent third persons purchasing at the trustee's sale, and not the beneficiary of the trust purchased at the sale brought about by it.[57]

Presumably, this recital in the trustee's deed would protect only the bona fide purchaser under this analysis.

Because the sale authorized by this act cannot take place within six months of the date of default,[58] there is a six-month period[59] in which the default may be cured by the grantor, his successor in interest, any subordinate lien or encumbrance holder of record.[60] Further, the

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[48] Wash. Sess. Laws 1965, ch. 74, § 7.
[49] Wash. Sess. Laws 1965, ch. 74, § 4(4).
[50] WASH. REV. CODE § 6.24.060 (1956).
[51] Brady v. Ford, 184 Wash. 467, 52 P.2d 319 (1935).
[52] Wash. Sess. Laws 1965, ch. 74, § 8(1). The expenses of the sale include a reasonable attorney fee.
[53] Wash. Sess. Laws 1965, ch. 74, § 8(2).
[54] Wash. Sess. Laws 1965, ch. 74, § 8(3). Presumably, the borrower would thus receive any surplus proceeds.
[55] Wash. Sess. Laws 1965, ch. 74, § 4(5).
[56] 25 Wn. 2d 797, 172 P.2d at 247.
[57] 25 Wn. 2d at 804, 172 P.2d at 247.
[58] Wash. Sess. Laws 1965, ch. 74, § 4(6).
[59] Wash. Sess. Laws 1965, ch. 74, § 9. This is the statutory embodiment of the equity of redemption. See note 13 *supra*.
[60] By extending the equity of redemption to junior lien holders, the act is similar to the statutes of Idaho, IDAHO CODE ANN. § 45-1506(12) (Supp. 1965); Montana, MONT. REV. CODES ANN. § 52-413 (Supp. 1965); and Oregon, ORE. REV. STAT. 86.765 (1963).

grantor may restrain a threatened sale by the trustee upon any proper ground.[61] This should adequately protect the borrower.

The act contains a provision which, it is believed, seriously hinders its effectiveness:

> No sale as authorized under this act shall take place at any time a court action to foreclose a lien or other encumbrance on all or any part of the secured property is pending.[62]

Presumably, such liens or encumbrances can be either prior or subsequent in time to the trust deed. The grantor could thus frustrate the trustee's sale under the act by subsequently encumbering the property (*e.g.*, consulting an attorney who takes a note secured by a mortgage on the encumbered property as his fee) under an agreement whereby the holder of the encumbrance commences an action to foreclose. Private sale is then impossible and the very purpose of the act defeated. It is difficult to understand the rationale justifying this provision,[63] and it is hoped we will profit from Oregon's experience and repeal this provision.[64] In any event, the reader's attention is directed to this gargoyle accompanied with a caveat as to its possible nuisance employment by a scheming mortgagor.

III. The Purchaser At The Trustee's Sale

The trustee's deed conveys the grantor's title—both present and after-acquired—to the purchaser at the trustee's sale.[65] There is no statutory right of redemption after the trustee's sale[66] so all possessory rights including homestead rights[67] are extinguished upon private sale pursuant to the act.

Washington's provision is quite liberal, eliminating the right to accelerate the obligation upon failure to make periodic payments. Further, junior lien holders can protect their liens without the necessity of satisfying the entire primary indebtedness.

[61] Wash. Sess. Laws 1965, ch. 74, § 13.

[62] Wash. Sess. Laws 1965, ch. 74, § 4(7).

[63] Perhaps the provincial fear and distrust of the mortgagee led to this provision which, admittedly, does provide a ready weapon to frustrate the trustee's sale.

[64] Ore. Laws 1961, ch. 616, § 8(b). Oregon's original trust deed act contained a similar provision, Ore. Rev. Stat. § 86.730 (1959), but subsequent experience proved that such a provision defeated the very purpose of the act.

[65] Wash. Sess. Laws 1965, ch. 74, § 5. Compare Wash. Laws Ex. Sess. 1965, ch. 157, § 9-504. The owner of the title creates a lien in the trustee with a power of sale in the trustee, Wash. Sess. Laws 1965, ch. 74, § 3(1). When the trustee sells, his sale conveys title in the same manner as title to personalty is conveyed by notice and sale proceedings under the chattel mortgage statute, Wash. Rev. Code ch. 61.08 (1959).

[66] Wash. Sess. Laws 1965, ch. 74, § 5. In Roos v. Belcher, 79 Idaho 473, 321 P.2d 210 (1958), the Idaho court rejected contentions that such deniel of redemption was unconstitutional as a taking of property without due process.

[67] Wash. Rev. Code § 6.24.210 (1961). Possession by a homestead claimant after judicial sale of realty is dependent upon the statutory period of redemption. Elimination of the statutory right of redemption then eliminates such possessory rights.

The purchaser is entitled to possession of the property within twenty days of sale.[68] To enforce this right, the statute provides: "[He] shall have the right to the summary proceedings to obtain possession of real property provided in chapter 59.16 RCW."[69] Unfortunately, the unlawful detainer provisions of chapter 59.16 contain no summary proceedings to obtain possession of real property.[70] Indeed, its purpose is to try *title*,[71] and such proceedings are noted on the regular trial calendar with concommitant delays inherent in the crowded courts of today.[72] Since the statute expressly provides "summary proceedings to obtain possession of real property,"[73] it is believed that the legislature intended to use Washington's other unlawful detainer statute, Washington Revised Code ch. 59.12,[74] which provides summary proceedings to obtain possession. By enacting the wrong unlawful detainer statute,[75] the legislature has perpetuated the very evil at which the act is directed —judicial delay. It is hoped that the legislature will promptly remedy this accident.

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[68] Wash. Sess. Laws 1965, ch. 74, § 6.

[69] *Ibid.* Oregon and Idaho have no statutory provisions to assist the purchaser in gaining possession, thus leaving him to his common law remedies. Compare MONT. REV. CODES ANN. § 52-411 (Supp. 1965).

[70] There are two unlawful detainer acts in Washington. By the laws of 1891 (WASH. REV. CODE ch. 59.16 (1958)), unlawful detainer is defined as entering the land of another without permission or color of title, and provision is there made for a remedy which includes appending to the complaint an abstract of title which shall be proved according to the ejectment statute, in the event the defendant denies such title. (Rem. Rev. Stat. §§ 834-37) (WASH. REV. CODE ch. 59.16). The second act originally set out five conditions whereby unlawful detainer arose from a landlord-tenant relationship only, and was included in the general forcible entry and detainer statute. (Rem. Rev. Stat. §§ 810-12) (WASH. REV. CODE ch. 59.12). The confusion resulted when this second unlawful detainer act was amended in 1905 by the addition of a clause that was not restricted to a landlord-tenant relationship, but pertained to anyone. This amendment duplicated the definition of unlawful detainer by unauthorized entry as set out in Rem. Rev. Stat. § 834 (WASH. REV. CODE ch. 59.16), but prescribed no remedial procedure. (Rem. Rev. Stat. § 812-(6)) (WASH. REV. CODE ch. 59.12). That these are two independent enactments was determined in Columbia & Puget Sound R.R. Co. v. Moss, 44 Wash. 589, 87 Pac. 951 (1906). It has been held that in an action of unlawful detainer under Rem. Rev. Stat. § 812 (WASH. REV. CODE ch. 59.12), the right to possession is the only issue and the question of title is excluded. Angel v. Ladas, 143 Wash. 622, 255 Pac. 945 (1927). Also, title may not be tried in any action in unlawful detainer. Meyer v. Beyer, 43 Wash. 368, 86 Pac. 661 (1906). The rule that title is not in issue in unlawful detainer actions has been established in other jurisdictions. Note, 22 WASH. L. REV. 148 (1947).

[71] Proceedings brought under this unlawful detainer statute are to try title, WASH. REV. CODE § 59.16.020 (1958). See McGrew v. Lamb, 31 Wash. 485, 72 Pac. 100 (1903).

[72] Columbia & Puget Sound R.R. Co. v. Moss, 44 Wash. 589, 87 Pac. 951 (1906).

[73] Wash. Sess. Laws 1965, ch. 74, § 6.

[74] Under WASH. REV. CODE ch. 59.12 (1958), questions of title and possession are excluded, whereas tenant's title and right to possession are determined in an action under WASH. REV. CODE ch. 59.16 (1958). Angel v. Ladas, 143 Wash. 622, 255 Pac. 945 (1927).

[75] However, "chapter 59.16 RCW" was also designated in the original House Bill 303.

IV. JUDICIAL ANALYSIS

The Washington court has held a deed of trust to be, in effect, a mortgage.[76] Thus viewed, the trust deed does not convey title to the trustee,[77] but, rather, creates a lien in his favor. This construction is in accordance with the majority of lien theory jurisdictions[78] as well as the apparent intent of the act's draftsmen[79] and is consistent with tax laws.[80] Further, the use of the word "deed" does not necessarily imply a conveyance because Washington requires both conveyances *and* encumbrances to be by deed.[81] Thus, by the grantor's deed, the trustee receives only a lien which he can foreclose by selling the property at private sale, conveying in the same manner as title to personalty under the notice and sale provisions of the Chattel Mortgage Statute.[82]

A question may arise as to whether the trustee is a necessary party[83] in judicial foreclosure proceedings. In jurisdictions where the trustee has legal title in the secured property with a duty to administer his trust for the benefit of the parties, he is held to be a necessary party.[84] However, in a jurisdiction in which the trustee has no legal title, he is neither a necessary or proper party to a judicial foreclosure.[85] In

[76] Morrill v. Title Guar. & Sur. Co., 94 Wash. 258, 162 Pac. 360 (1917).

[77] 3 JONES, MORTGAGES § 2290 (8th ed. 1928). Should *Morrill* be subsequently overruled and the trust deed construed as conveying title to the trustee, a pandora's box would indeed be opened. California, a mortgage lien theory state, construes the trust deed as conveying title to the trustee and this creates a great deal of unnecessary confusion. See Kidd, *Trust Deed and Mortgages in California,* 3 CALIF. L. REV. 381 (1915); Cormack & Irsfield, *Application of the Distinction Between Mortgages and Trust Deeds in California,* 26 CALIF. L. REV. 206 (1938).

[78] 3 JONES, *op. cit. supra* note 77.

[79] Wash Sess. Laws 1965, ch. 74, § 2 provides:

> A deed conveying real property to a trustee in trust to secure the performance of an obligation of the grantor or another to the beneficiary may be foreclosed as in this act provided. The county auditor shall record such deed as a mortgage and shall index the name of the grantor as mortgagor and the name of the trustee and beneficiary as mortgagee.

[80] WASH. REV. CODE § 82.20.010 (1958) (Stamp Tax) provides: "This section shall not apply to any instrument or writing given to secure a debt...."
WASH. REV. CODE § 28.45.010 (1958). Sale defined for 1% tax:

> The term shall not include . . . a mortgage or other transfer of an interest in real property merely to secure a debt....

INT. REV. CODE OF 1954, § 4362, Exemptions: The tax imposed by § 4361 shall not apply to any instrument or writing given to secure a debt.

[81] WASH. REV. CODE § 64.04.010 (1958).

[82] See note 65 *supra.*

[83] WASH. R. PLEAD. PRAC. P. 19(a). See also Rule 17(a). Where title and right to possession of land are in issue, all parties having an interest in the land must be joined, Washington v. United States, 87 F.2d 421 (9th Cir. 1936). See also Blodgett v. Orton, 14 Wn. 2d 270, 127 P.2d 671 (1942).

[84] Skinn v. Kitchens, 208 Ark. 321, 186 S.W.2d 168 (1945); East Carolina Lumber Co. v. Pamlico County, 250 N.C. 681, 110 S.E.2d 278 (1959).

[85] A & R Realty Co. v. Northwestern Mutual Life Ins. Co., 95 F.2d 703 (8th Cir. 1938). Although viewing the trustee as having legal title, California does not consider

Washington, assuming the trustee does not have legal title, it is unlikely that the trustee will be a necessary party to judicial foreclosure proceedings.[86]

IV. CONCLUSION

By enacting the Deed of Trust Act with is private sale provisions, Washington has joined its sister states[87] and taken a substantial step in modernizing its archaic real property realization procedures. Admittedly, the act is susceptible of criticism and in need of amendment,[88] but it is suggested that the trust deed will, or should be used in all future instances of non-construction home real estate financing. Trust deed financing offers all the protection, rights, and benefits of a mortgage and provides the option, upon default, to select judicial or non-judicial foreclosure. Suggested amendments, accompanied with a brief analysis, are set forth in the appendix which follows.

APPENDIX A
PROPOSED AMENDMENTS

1. *Eliminate paragraph seven of Section Four which forbids sale by the trustee "at any time a court action to foreclose a lien or other incumbrance on all or any part of the secured property is pending."* Under this provision, the primary purpose of the act can be frustrated. Since no distinction is made between existing or subsequent liens, the grantor could subsequently encumber the property under an arrangement in which the encumbrance holder would commence court action to foreclose his encumbrance. Thus, while such an action is pending, no private trustee's sale is possible. There is no apparent justification for this provision and its nuisance potential makes its presence undesirable in trust deed financing.

2. *Amend paragraph one of Section Four to reduce the 180 day notice period to 120 days.* One of the primary objectives of the Deed of

the trustee a necessary or proper party in judicial foreclosure proceedings. Mortgage Guarantee Co. v. Lee, 51 Cal. 2d 367, 143 P.2d 98 (1943).

[86] Morrill v. Title Guar. & Sur. Co., 94 Wash. 258, 162 Pac. 360 (1917).

[87] The trust deed with the right of private sale has existed in California since 1859, Koch v. Briggs, 14 Cal. Rep. 257 (1859); and in Nevada since 1927, NEV. REV. STAT. ch. 107 (1957). Idaho enacted a trust deed act in 1957, IDAHO CODE ANN. §§ 45-1501—1515 (Supp. 1965) which was upheld as constitutional in Roos v. Belcher, 79 Idaho 473, 321 P.2d 210 (1958). Oregon enacted its trust deed act in 1959, ORE. REV. STAT. § 86.705-795 (1959); and Montana followed in 1963, Mont. Laws 1963, ch. 177 now codified as MONT. REV. CODES ANN. ch. 52-4 (Supp. 1965).

[88] Specific provisions of the act have been discussed throughout this article and the recommended amendments are collected in an accompanying Appendix.

Trust Act was to reduce the time needed to realize upon a security interest. Although preferable to the existent time-consuming judicial foreclosure procedure, a 180 day notice period is unnecessary. Such a period serves no useful purpose and reducing this period to 120 days (or an even shorter period) would appear the logical complement to a modern real property realization procedure. Idaho,[89] Oregon[90] and Montana[91] provide 120 day notice in their trust deed provisions. Moreover, the lengthened period of notice tends to force the lender to record notice of any default as soon as possible in order to initiate the 180 day period. Thus, upon a mere technical default, the lender is apt to record notice of default.

3. *Amend Section Six by substituting the unlawful detainer provisions of Washington Revised Code ch. 59.12 for those of ch. 59.16.* As pointed out in the text,[92] the unlawful detainer provisions of Washington Revised Code ch. 59.16 do not provide summary proceedings for obtaining possession to real property. By expressly providing for summary possession in Section Six, the legislature has recognized the need for summary possession to fully implement the Deed of Trust Act. Thus, it is hoped that the legislature will enact the unlawful detainer provisions which, in fact, do provide summary possession—Washington Revised Code ch. 59.12.

4. *Add a provision enabling the removal of a recorded notice of default if duly cured or satisfied by the borrower.* The act presently contains no such provision and its addition would inure to the benefit of the borrower and also the lender. The borrower now faces the stigma of having his default on public record[93] and this stigma remains whether he cures his default or not. The removal from public record is of obvious advantage to the defaulting borrower. The lender, too, benefits in that the borrower is thus encouraged to cure his default promptly.

5. *Amend Paragraph Five of Section Four to provide the trustee reasonable discretion in determining time and place for sale.* The statute rigidly specifies the time (Friday between 9:00 a.m. and

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[89] IDAHO CODE ANN. § 45-1506 (Supp. 1965).
[90] ORE. REV. STAT § 86.740 (1963).
[91] MONT. REV. CODES ANN. § 52-409 (Supp. 1965).
[92] See text accompanying notes 68-75 *supra.*
[93] Wash. Sess. Laws 1965, ch. 74, § 4(1).

4:00 p.m.) and place (courthouse) of the trustee's sale.[94] Although aimed at preventing abuse of the power of private sale, this inflexible provision does not seem justified. There are many instances when a change of time or place would be to the advantage of all parties to the trust deed transaction.[95] Indeed, if trust deed financing becomes popular, the court house steps will be a scene of chaos. Specifically, the power to postpone the sale due to exigencies of inclement weather, unfavorable market conditions, etc., would seem implicit in the power of private sale by the trustee. Further, the lender is denied the right to deficiency judgment so there is ample incentive to secure the highest possible sales price.[96] It is submitted that a reasonable opportunity should be provided to enable the trustee to obtain the maximum sales price.[97]

6. *Section Ten should be amended to provide the lender the right to a deficiency judgment.* Because of the rigid statutory supervision of the trustee's sale,[98] there is little danger to the borrower of a collusive or unfair sale. This "declared public policy" led the Washington court[99] to deny a deficiency judgment to the chattel mortgagee who foreclosed by notice and sale.[100] These considerations are not present under the act. The lack of the right to a deficiency judgment is presently the unwarranted "price" exacted for an election to foreclose under the act. That the lender has chosen to foreclose by trustee's sale rather than judicial process should not affect the right to a deficiency judgment.[101]

7. *Add a provision indicating legislative policies toward failure to comply with literal requirements of the act.* For example, the Uni-

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[94] Wash. Sess. Laws 1965, ch. 74, § 4(4). See WASH. REV. CODE § 6.24.020 (1956).

[95] Williams v. Continental Sec. Corp., 22 Wn. 2d 1, 153 P.2d 847 (1944). The sheriff has discretionary power to postpone the sheriff's sale, WASH. REV. CODE § 6.24.040 (1958). Montana affords the trustee power to postpone the sale. MONT. REV. CODES ANN. § 52-409 (2) (Supp. 1965).

[96] Wash. Sess. Laws 1965, ch. 74, § 10.

[97] In justifying the sheriff's discretionary power in conducting execution sales, the Washington court has said: "It is the policy of the law that execution sales should be so conducted as to multiply bidders, promote competition, and effect sale of the property to the highest responsible bidder." Williams v. Continental Sec. Corp., 22 Wn. 2d 1, 10, 153 P.2d 847, 852 (1944). These same policy considerations justify a similar discretionary power in the trustee.

[98] Wash. Sess. Laws 1965, ch. 74, § 4(7).

[99] Lessard v. Smith, 45 Wn. 2d 473, 275 P.2d 730 (1954).

[100] WASH. REV. CODE § 61.08.010 (1959).

[101] *Compare* MONT. REV. CODES ANN. § 52-414 (Supp. 1965), *with* ORE. REV. STAT. § 86.770 (2) (1963).

form Commercial Code, recently enacted by our legislature,[102] provides: "This act shall be liberally construed and applied to promote its underlying purposes and policies."[103] Moreover, Washington's real property recording statute provides that an irregular recorded instrument nonetheless imparts notice.[104] In view of the act's explicit technical requirements,[105] a provision evincing a similar attitude would indeed implement the maximum use of trust deed financing.

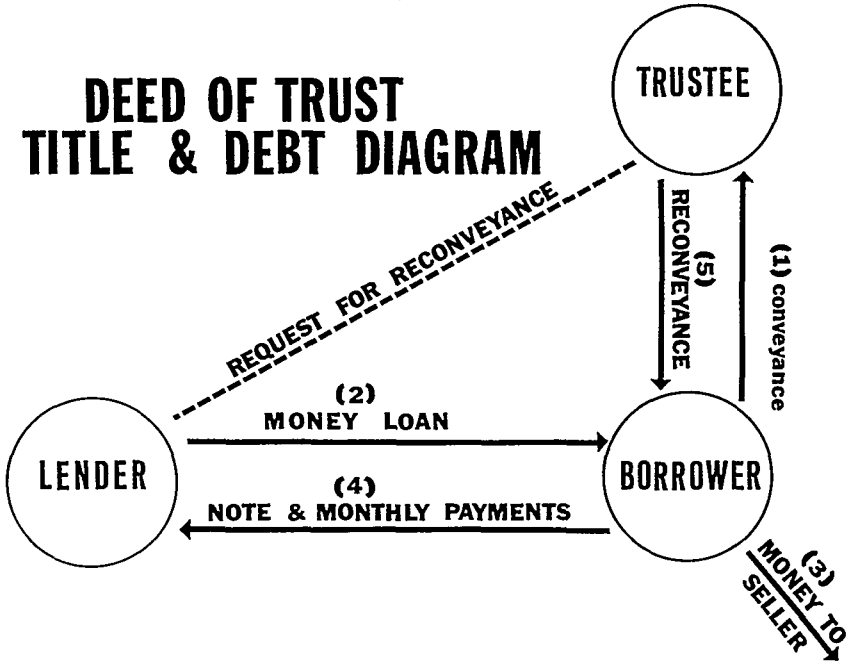
[102] Wash. Sess. Laws 1965, ch. 157.

[103] Wash. Laws, Ex. Sess. 1965, ch. 157, § 1-102(1). See §§ 9-401(2) & 9-402(5). Recent decisions "liberally" construing § 9-402 include In the Matter of Excel Stores, Inc., 341 F.2d 961 (2d Cir. 1965) and Benedict v. Lebowitz, 346 F.2d 120 (2d Cir. 1965), 41 WASH. L. REV. 180 (1965).

[104] WASH. REV. CODE § 65.08.030 (1959).

[105] *E.g.*, Wash. Sess. Laws 1965, ch. 74, § 4(2).

Appendix B



Appendix C