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COMMENTS

STATUTORY REDEMPTION: THE ENEMY OF HOME FINANCING

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Although much has been written criticizing the statutory right of redemption from real estate foreclosures,¹ it still exists in Washington² and a majority of the United States. The basic reason for its continued existence is the strong trend throughout modern times to give greater protection to the "oppressed debtor."³ The history of the moratoria legislation of the last depression is the strongest evidence of the sympathy for the debtor class,⁴ and the statutory right of redemption comprises not only a large part of the trend, but it is the place where the policy of favoring the mortgage debtor has reached the point of diminishing returns. The right does not favor the borrower but rather hinders him in obtaining a loan adequate in relation to the amount of his security. When this is coupled with the extreme disadvantages to the mortgage lender, it is hard to find a rational basis for its continued existence in such a large number of states.⁵ The only explanation is the failure of the legislatures to realize the actual effect of the statutory period. It is the purpose of this article to show the effect and to point out reasons why the redemption statute should be repealed, or, at least, the period shortened from the extreme length of one year.⁶

Under the Washington statute, when mortgaged property is sold under a foreclosure judgment, it may be redeemed by the judgment

¹ Carey, Brabner-Smith, Sullivan, *Studies in Foreclosures in Cook County: II. Foreclosure Methods and Redemption*, 27 ILL. L. REV. 613 (1933); Durfee and Doddridge, *Redemption from Foreclosure Sale—The Uniform Mortgage Act*, 23 MICH. L. REV. 825 (1925); Shattuck, *Fashions in Real Property Security*, 16 WASH. L. REV. 205 (1941); Bridewell, *The Effects of Defective Mortgage Laws on Home Financing*, 5 LAW & CONTEMP. PROB. 545 (1938); Tefft, *The Myth of Strict Foreclosure*, 4 UNIV. OF CHIC. L. REV. 575 (1937); 2 JONES, MORTGAGES (8th Ed.) § 1473 (1928); 2 GLENN, MORTGAGES 1133 (1943).

² RCW 6.24.130-160, 210 [RRS §§ 594-597, 602].

³ See Moore and Countryman, DEBTORS' AND CREDITORS' RIGHTS 1-11 (1951).

⁴ Prosser, *Minnesota Mortgage Moratorium*, 7 SO. CALIF. L. REV. 353-71 (1934); Poteat, *State Legislative Relief for the Mortgage Debtor During the Depression*, 5 LAW & CONTEMP. PROB. 517 (1938).

⁵ Twenty-eight states have long redemption periods, but in four of these states the redemption period precedes rather than follows the sale of the property. Bridewell, *supra*, at 548.

⁶ However, shortening the redemption period would only be a compromise to make some reform, and would not adequately solve the problems created by the statute.

debtor (mortgagor), his successor in interest, or "any creditor having a lien by judgment, decree, or mortgage, on any portion of the property, . . . subsequent in time to that on which the property was sold."⁷ These creditors are, by statute, referred to as redemptioners. In all cases the judgment debtor is allowed to redeem at any time within one year after sale,⁸ but a redemptioner will only be given the full period when he is the first to redeem, because if there is a prior redemption, successive redemptions must be made within sixty days of each other.⁹ The price the judgment debtor or redemptioner must pay to redeem is the amount the purchaser paid,¹⁰ or if the property is redeemed from a prior redemptioner, the amount he paid to redeem.¹¹ The purchaser or the last redemptioner is not given title to the property until the entire year has elapsed, as there is the possibility that the judgment debtor will exercise his right since he is always allowed the entire one year redemption period.¹²

The fact that a purchaser of the property at the judgment sale will have to wait for one year before he knows whether he will get title to the property causes the judicial sale of foreclosed property to be a public auction in name only, since virtually the only person who bids at the sale is the mortgagee.¹³ A person's desire for a particular piece of property would have to be very strong to cause him to bid for it, as he knows he is buying a mere expectation. Public participation at the sale was one of the chief benefits that was expected to follow when foreclosure by judicial sale was first originated, but it is clear that long redemption statutes have eliminated this benefit.¹⁴ Competitive bidding would offer a great advantage, because it is the best way to insure that the property will be sold for an adequate price, reducing the possibility of a large deficiency judgment against the debtor.¹⁵

⁷ RCW 6.24.130 [RRS § 594].

⁸ RCW 6.24.140 [RRS § 595].

⁹ RCW 6.24.150, 160 [RRS §§ 596, 597].

¹⁰ Plus interest at the rate of eight per cent per year, taxes, assessments, and "if the purchaser is also a creditor having a lien by judgment, decree, or mortgage, prior to that of the redemptioner, other than the judgment under which the purchase was made, the amount of such lien with interest." RCW 6.24.140 [RRS § 595].

¹¹ Plus amounts similar to those indicated in note 10. RCW 6.24.150, 160 [RRS §§ 596, 597].

¹² RCW 6.24.160 [RRS § 597].

¹³ In the State of New York, *Report of the Joint Legislative Committee on Mortgage Moratorium and Deficiency Judgments*, N. Y. LEGISLATIVE DOCUMENT No. 58 (1938), it was reported: "Everywhere throughout the state it appears that there is no open bidding on foreclosure sales. Out of 40,853 foreclosures reported, the mortgagee bid in the property in 40,570 cases."

¹⁴ Carey, Brabner-Smith, Sullivan, *supra*.

¹⁵ RCW 6.12.070 [RRS § 1119]: "If there is an express agreement for the payment

Since the mortgagee is the only one bidding for the property, he is faced with a problem as to the amount of his bid. If he bids too high and the market value of the property falls below his bid, he is going to suffer a loss, since no one will want to redeem at a price greater than the value of the property. If his bid is too low and there is an extreme rise in realty prices, the redemptioners are likely to be flocking in to get the property at a bargain price. The mortgagee must also take into account the amount of depreciation on the property during the redemption period. This is especially so if the mortgagor is entitled to possession during the redemption period because of homestead rights.¹⁶ Although waste may be enjoined,¹⁷ it is difficult to detect its occurrence until the damage is done, and mere neglect in keeping the property in good condition can often cause just as much harm to the property as active waste. One point that must be considered by the mortgagee is the fact that if there are persons other than the judgment debtor who could redeem, and the mortgagee bids only a nominal amount for the property, any of the redemptioners can come in and pay what the mortgagee paid, leaving him with only a deficiency judgment which probably cannot be satisfied. Therefore he will be forced to bid substantially the value of the property less the costs of foreclosure and the amount necessary to compensate for the risks of waste, depreciation, and market decline, unless, of course, the debtor has other assets out of which the mortgagee can satisfy a large deficiency judgment.¹⁸ This has been advanced as an argument for maintaining the redemption statute,¹⁹ on the ground that it keeps the mortgagee from bidding only a nominal amount, but it is certainly not a valid contention, since the upset price statute²⁰ coupled with competitive bidding, which would be possible with repeal of the redemption statute, should give sufficient protection against inadequate price.

The hardships placed upon the mortgagee because of the redemption period lead to the inevitable result that the financing institutions at-

of the money secured, contained in the mortgage or separate instrument, the court shall direct in the decree of foreclosure that the balance due on the mortgage and costs which remain unsatisfied after the sale of the mortgaged premises, shall be satisfied from any other property of the mortgage debtor."

¹⁶ RCW 6.24.210 [RRS § 602].

¹⁷ RCW 6.24.200 [RRS § 601]: "Until the expiration of the time allowed for redemption the court may restrain the commission of waste on the property. *It is not waste* for the person in possession of the property at the time of the sale or entitled to possession afterward during the period allowed for redemption *to continue to use it in the same manner in which it was previously used. . . .*" (Italics supplied).

¹⁸ Durfee and Doddridge, *supra*.

¹⁹ 2 GLENN, MORTGAGES 1133.

²⁰ RCW 61.12.060 [RRS § 1118].

tempt to compensate for the risks by being less liberal in the terms of the mortgage and the amount of the security they require for the loan. Also the risk of being burdened with a piece of property which will be tied up for such a long time in the case of foreclosure, will cause the lender to shift a greater amount of this risk to the borrower. In Washington a very large proportion of the mortgages are being held by eastern insurance companies, which naturally are more inclined to invest their capital in states where there are much cheaper and faster methods of realizing out of the security.²¹ At the present time with a lack of capital in the investment end of home financing,²² it is a matter of public concern to create a better market in this state for mortgage investment.²³ The present practice in King County is to allow a loan of only fifty to sixty per cent of the security. In an area where the redemption period is short or there is none at all, the lender can go much higher in his loan as compared to the value of the security. Surely the man who wishes to build a home is at a great disadvantage when he is forced to put up \$10,000 security to get a \$5,000 loan.²⁴

Proponents of the redemption statute strongly contend that we need a long redemption period to give the debtor another chance. This has very little merit when viewed in the light of the facts. *First*, very few redemptions are ever made,²⁵ so the long period is of little if any

²¹ Meyer Fink in the *COMMERCE MAGAZINE*, June 13, 1931: "An executive of one of the large insurance companies of Hartford, Connecticut which has previously invested heavily in Illinois mortgages writes, rather heatedly: 'Illinois does not have the worst foreclosure laws of any state, but it ranks close to the bottom in this respect. . . . There is no doubt that a long foreclosure law does add greatly to the amount of money involved in a property by the time the lender takes title. It means that we have to get just that much more money on the sale if we are to break even, or, if a sale is impossible, that we have to earn interest on that much more money while we hold the property. Furthermore, there is no doubt that a long redemption period leads to greater depreciation of the property by the time we get title. One of the greatest lessons of this severe decline in realty values will be the great advantage of lending in states with quick foreclosure laws. It is apparent that foreclosure costs are much lower where you have short foreclosure laws. As to my personal opinion, I would say definitely that from now on we will prefer to lend in states where there are short or discretionary redemption periods.'" It should be noted that the Illinois redemption statute referred to in this letter is comparable to that in Washington. 77 ILL. ANN. STAT. §§ 18-29.

²² See *Mortgage Financing Hearings before the Committee on Banking and Currency*, U.S. SENATE, 82ND CONGRESS, Feb. 6, 7, and 8, 1952, U.S. Gov't. Printing Office, which brings out the grave necessity at the present time for additional capital for home financing.

²³ Bridewell, *supra*, at 559, states: "The legal basis for home financing and mortgage lending in general would be greatly improved if these periods of redemption were entirely abolished in all states, or made as short as possible."

²⁴ "If many potential and prospective home owners of moderate means are to receive full advantage of the generous benefits provided in the National Housing Amendments, the mortgage and foreclosure laws of many states must be substantially revised." *Ibid*, at 553.

²⁵ A study of HOLC experience made in 1938 showed that out of 22,000 properties foreclosed, only 204 or less than one per cent were redeemed despite the substantial

benefit to the mortgagor. In order to redeem, the debtor must pay the entire debt in cash during the redemption period, which is usually impossible as there never would have been a foreclosure had he been able to meet the payments on the mortgage. If he could not meet the comparatively small payments, what chance will he have of paying the entire debt in one lump sum? *Second*, in the last ten years there have been an extremely small number of foreclosures.²⁶ *Third*, the present day liberal methods of refinancing and reinstatement allow the debtor a sufficient opportunity for "another chance." This liberality may be based to a certain extent on the fact that the mortgage institutions are not in the real estate business and do not want to foreclose unless they are forced to. The mortgagee is no longer the villainous miser, breathlessly waiting for an opportunity to throw the mortgagor out of his home and into the snow. Today he is much more interested in collecting interest on his investment. Competition between financing institutions is probably the biggest factor in creating an atmosphere of friendliness to the debtor. An example of this atmosphere can be seen in the policy of one of the larger savings and loan associations in King County. It allows the debtor a thirty day delinquency period, and no action will be taken by the institution for ninety days unless the debtor is considered a hopeless case because of his past performance. In most cases where a person has a good excuse for non-payment, the lender will give a six or eight month waiver of principal payments and collect only interest. When this six or eight month period is coupled with the time between the institution of the foreclosure suit and the judicial sale of the property it will be seen that the debtor has already been given a chance to straighten out his financial distress. When to this is added a twelve month period of redemption, the length of time ceases to be anywhere near reasonable.

The statutory redemption is even more inequitable when viewed in the light of the provision giving possession to the debtor during the redemption period.²⁷ Generally the purchaser from the day of sale, or a redemptioner from the day of his redemption is entitled to possession, but where the judgment debtor has selected a homestead on the property, or the property is a farm, the debtor is entitled to possession.

redemption periods permitted in most cases. This indicates that there is less than one chance in ninety-nine of the mortgagor's redeeming. *Ibid*, at 558 n. 28.

²⁶ A savings and loan association in Seattle which holds 4,000 mortgages at the present time has foreclosed only two in the last five years.

²⁷ RCW 6.24.210 [RRS § 602]. Twenty-four out of the twenty-eight states which have long redemption periods allow the debtor possession during this period. *Bridwell, supra*, at 548.

Homestead is defined as consisting of "the dwelling house, in which the claimant resides, with appurtenant buildings, and the land on which the same is situated, and by which the same are surrounded, or land without improvements purchased with the intention of building a house and residing thereon. . . ." ²⁸ Since the debtor can make his homestead selection at any time before the sale, ²⁹ in practically all cases where the mortgaged property is a home, the debtor will be given the right to possession. This possessory right of the debtor is in effect giving him a free ride for one year at the expense of the purchaser at the foreclosure sale, since the debtor is not required to account to the purchaser for the issues of the property or even to pay rent for the possession. ³⁰ Before the recent case of *First National Bank of Everett v. Tiffany*, ³¹ the Washington court in *First National Bank v. Mapson* ³² had held that the mortgagor under a purchase money mortgage, as distinguished from the normal type of mortgage, was not entitled to possession during the redemption period. The court reasoned that the purchase money mortgagor can have no right of homestead until the purchase price is paid, and since the possessory right rests upon the right of homestead, he has no valid claim to possession. This decision was very questionable since it was based on two cases which were not in point. ³³ The court in the *Tiffany* case recognized this error and using the correct interpretation of the statute, ³⁴ which makes no distinction between the normal type of mortgage and the purchase money mortgage, overruled the *Mapson* case by giving the mortgagor possession of the property during the period of redemption.

The overzealous protection of the mortgage debtor in home financing becomes more dubious when it is compared with the other popular method of buying: the real estate conditional sale contract. Under the contract method the borrower has no protection at all as compared to his neighbor, who has a mortgage and is given a windfall. The average home buyer probably is not aware of this and does not even consider forfeiture when obtaining his contract. The large number of

²⁸ RCW 6.12.010 [REM. SUPP. 1945 § 528].

²⁹ *Ibid.*

³⁰ RCW 6.24.210 [RRS § 602].

³¹ 40 Wn. 2d 193, 242 P. 2d 169 (1952).

³² 181 Wash. 196, 42 P. 2d 782 (1935).

³³ *Swanson v. Anderson*, 180 Wash. 284, 38 P. 2d 1064 (1934), which was an action to forfeit a real estate contract and to quiet title; and *Lyon v. Herboth*, 133 Wash. 15, 233 Pac. 24 (1925), in which the question of possession was neither tendered nor discussed.

³⁴ RCW 6.24.210 [RRS § 602].

homes being purchased on contract at the present time³⁵ indicates that the "oppressed debtor" is not too worried about his "oppression."

Repeal of the redemption statute alone will not solve the foreclosure problem in Washington. Our entire method of foreclosure is extremely cumbersome and therefore costly. At the present time the minimum cost of foreclosure in Washington is between 250 and 300 dollars.³⁶ In 1937, during a period when a great number of foreclosures were taking place, it was estimated that the cost to the lender in obtaining an indefeasible title because of the time required to foreclose or to permit the running of the redemption period averaged at least two dollars per day on a \$5,000 mortgage.³⁷ This cost will ultimately be shifted to the debtor or his property. A survey made by the Home Owners' Loan Corporation indicated that during the period from 1928 to 1938 if one million mortgages were foreclosed, then at an average cost of \$124 each, \$124,000,000 would have been spent for mortgage foreclosures. The approximate cost at that time of foreclosure in states where the methods were simple and the time required in most instances was less than three months was \$55. If this had been uniform throughout the United States, then only \$55,000,000 would have been spent—a saving of approximately \$70,000,000.³⁸ This saving would be a great benefit to the public since it would create more capital for investment in home financing. During the last fifteen years the number of foreclosures has been reduced to a great extent because of the era of prosperity, but it would definitely be in the public interest to make certain that this great waste of capital will not occur again if another depression creates another necessity for a large number of foreclosures.

The various uniform mortgage acts, which have been proposed for many years, with little success, have attempted to do away with the great defects in the foreclosure laws.³⁹ Some of them provide redemption periods of thirty days to three months after sale, but even these periods are criticized strongly by the proponents of the acts as being merely concessions to the states which have long redemption periods.⁴⁰

³⁵ One savings and loan association in Seattle holds approximately six or seven hundred contracts for collection.

³⁶ Information obtained from interviews with several financing institutions in Seattle.

³⁷ Horace Russell, former General Counsel, Federal Home Loan Bank Board and Its Agencies, in an address before the United States Building and Loan League, Los Angeles, California, October 7, 1937.

³⁸ Bridewell, *supra*, at 551.

³⁹ See Reeve, *The New Proposal for a Uniform Real Estate Mortgage Act*, 5 LAW & CONTEMP. PROB. 564 (1938); Durfee and Doddridge, *supra*; *The Model Power of Sale Mortgage Foreclosure Act—An Appraisal*, 27 V. L. REV. 926 (1941).

⁴⁰ Reeve, *supra*, at 576.

These comparatively short periods have also created barriers to adoption of the acts in states which have no redemption periods, since they are just as heatedly opposed to inserting such periods as are the states with redemption statutes to abolishing them.⁴¹

It is suggested that the legislature of this state make a detailed study of the mortgage laws with the following objectives in mind: (1) making the sale of foreclosed property a *public* auction in reality, and not merely in name, by making competitive bidding economically practicable; (2) increasing the maximum amount of the loan which a lending institution will be willing to advance; (3) making mortgage funds more accessible by simplifying the procedures in the mortgage laws; and (4) reducing foreclosure costs which are ultimately charged to the mortgagor or his property.⁴² One of the best means of reaching these objectives is by abolishing the statutory period of redemption, or if this is not possible, by at least shortening it to a great extent. If this is accomplished the field of home financing in Washington will be released from the shackles of a law which had as its goal a greater benefit to the debtor but which has completely failed in its purpose.

⁴¹ *Ibid.* It is interesting to note that most of the larger commercial states are among those which have no redemption periods.

⁴² It is not the purpose of this comment to discuss the causes of the high cost of mortgage foreclosures, other than the long redemption period, but it should be pointed out that in order to reduce foreclosure costs to a reasonable amount, it will be necessary to change our entire method of foreclosure from foreclosure by judicial action to extra-judicial exercise of a power of sale. Judicial action by its very nature creates a high cost, while a well drafted power of sale act should, in most cases, be a very effective and inexpensive method. In *The New Proposal for a Uniform Real Estate Mortgage Act*, *supra*, Reeve presents an excellent discussion of the power of sale method showing how it can be drafted to provide for inexpensive foreclosure and still give adequate protection to the mortgagor. For a survey of foreclosure costs under the Illinois statutes, which are similar to those in Washington, see Carey, Brabner-Smith, Sullivan, *Studies in Foreclosures in Cook County* (in two parts), 27 *ILL. L. REV.* 476, 595 (1933).