

ASSESSING THE MORTGAGE DEBTOR'S PERSONAL LIABILITY

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Measures for the relief of debtors, including bankruptcy, exemption, and stay laws, are the inevitable product of depression periods, periods when an increasing class of unfortunate people assumes a position of influence in government. Since mortgage indebtedness, of all the types of private long-term debts in our country, occupies the chief position in volume and social importance, it is natural that the period of depression through which we have been passing has aroused much legislative attention to the distressing position of the mortgage debtor. The mortgage debtor owes money because he is or has been a home owner, and the traditions of our country have always encouraged and protected the institution of home ownership. He is a person whose value to the community merits as much protection as can be fairly given. It is not surprising that his sorry position in days of widespread default and foreclosure should attract the active sympathy of legislative representatives.

In their endeavor to solve the difficult problem of relief for mortgage debtors, legislatures sanctioned a variety of measures, all of significance. The federal government's activities included the refunding of old mortgages through H. O. L. C. and Emergency Farm Mortgage Corporation and the stimulation of new investments through F. H. A. Many state legislatures, in an effort to break the wave of liquidation and afford property owners an opportunity to refinance, passed moratoria. In a similar spirit, the so-called anti-deficiency-judgment legislation was passed, which attempted to create what was considered to be a fairer method than had previously existed of assessing the debtor's personal liability upon default.

Our attention has been particularly directed to the last type of relief measure by the recent declaration of the Supreme Court of Pennsylvania¹ upholding the constitutionality of the 1941 Pennsylvania Deficiency Judgment Act,² after previous legislative efforts in 1934,³

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1. *Fidelity-Philadelphia Trust Co. v. Allen*, 22 A. (2d) 896 (Pa. 1941). This case and the Act with which it is concerned are discussed in *Legis.* (1942) 90 U. OF PA. L. REV. 330.

2. Act July 16, 1941 No. 151.

3. Acts & Vetoes Spec. Sess. 1933-34, p. 243, providing for appraisal after sale to determine deficiency temporary in character.

1935⁴ and 1937⁵ had failed to receive judicial approval.⁶ The state constitutional provision against special legislation,⁷ which had been invoked to defeat the 1937 Act, was considered satisfied, by application of the technique adopted in the present Act to judgments on all types of contract claims, rather than to mortgage debts alone. The state impairment of the obligation of contracts clause⁸ (which would have invalidated such legislation according to a previous decision) was reinterpreted by the court in the interests of uniformity, in the light of the decision of the United States Supreme Court in the *Gelfert* case,⁹ holding that similar New York legislation did not violate the federal impairment of contracts clause.

Such decisions would indicate, that of all the measures passed in the recent depression which affected mortgages, those representing a movement toward change in the method of assessing the personal liability of mortgage debtors have most promise of lasting effect. Proposals to change existing methods of computing the debtor's liability have acquired an air of respectability. Doubtless when creditor times arrive, we may expect some retreat from reform. But it would seem a fair assumption that whatever changes are made, the imprint of the last ten years on deficiency-judgment practice will continue in many states. The question of assessing the mortgagor's deficiency, it is to be hoped, will no longer be obstructed by judicial absolutism: the dictates of fairness, propriety, and policy will govern in the future. If this is the case, it may be well to survey the existing methods of ascertaining the deficiency judgment, to discover the advantages and disadvantages of each, and to attempt a solution of the problem.

THE NATURE OF THE MORTGAGE DEBTOR'S PERSONAL LIABILITY

As any gagor, a mortgage debtor assumes a double risk: the risk that because of default he will lose the real estate security; the risk that he will be held personally liable for the deficiency. In the category of mortgage debtors may be found the vast majority of all owners of

4. Pa. Laws 1935, No. 197, p. 503. Same as previous act except that by its terms mortgagee was compelled to resort to foreclosure first.

5. Pa. Laws 1937, No. 561, p. 2751, providing for appraisal of property and establishment of upset price before sale.

6. 1934 Act declared unconstitutional in *Beaver County B. & L. Ass'n v. Winovich*, 323 Pa. 483 (1936). 1935 Act declared unconstitutional in *Shallcross et al. v. North Branch-Sedgwick B. & L. Ass'n*, 123 Pa. Super. 593 (1936). 1937 Act declared unconstitutional, *Pennsylvania Company v. Scott*, 329 Pa. 534 (1938).

7. PA. CONST. ART. III, § 7: "The General Assembly shall not pass any local or special law . . . providing or changing methods for the collecting of debts, or the enforcing of judgments, or prescribing the effect of judicial sales of real estate."

8. PA. CONST. ART. I, § 17: "No . . . law impairing the obligation of contracts . . . shall be passed."

9. *Gelfert, Executor v. National City Bank of New York*, 313 U. S. 221 (1941).

encumbered realty. The owner has become personally liable as original mortgagor, or because as purchaser he expressly assumed the payment of an outstanding mortgage, or because the mortgagee demanded and received from him a collateral bond under a threat of foreclosure. Whatever may have been the circumstances, personal liability of an owner of mortgaged premises appears to be the rule and not the exception, and this risk will probably continue even after he has sold the premises to another, for it can only be terminated by novation, cancellation or satisfaction.

The onerous duality of the mortgage transaction will become clear upon default.¹⁰ In most states, the creditor has at least two methods of collecting his claim—methods which may be pursued concurrently or successively. First, he may bring an action at law upon the note or bond evidencing the obligation, a remedy which is particularly speedy and effective in a state such as Pennsylvania where confession of judgment clauses are recognized as valid. Judgment obtained, he may then levy upon any and all personal and real property of the debtor, including the mortgaged premises. Second, he may foreclose the mortgage, sell the property, and become entitled to a deficiency judgment for the balance. If the foreclosure has been through exercise of the power of sale out of court (a popular practice in many states), the deficiency judgment must be obtained by suing on the bond or note in a court of law. If the foreclosure has been strict, without public sale (as is the usual case in Connecticut and Vermont), or by the running of the prescribed period of adverse possession (frequent in Massachusetts and Maine), the deficiency judgment must follow appraisal proceedings to determine the value of the premises acquired by the mortgage creditors. If the foreclosure is in chancery (the usual case in a majority of the states), a deficiency decree may be obtained in the same suit upon confirmation of the sale. In Pennsylvania and Delaware, foreclosure is by *scire facias*; the proceeding is purely *in rem*; and to obtain a personal judgment, the creditor must then institute a separate action on the bond (*fiere facias*). Only in a minority of states is it necessary for the creditor first to exhaust the security before attaching other assets of the debtor.

THE FUNCTION OF THE PUBLIC SALE

Irrespective of the particular manner in which the security was liquidated, however, there was an essential similarity, in pre-depression days, in the manner in which the eventual deficiency of the mortgage

10. For a general exposition of the remedies of mortgage creditors, see Bridewell, *The Effects of Defective Mortgage Laws on Home Financing* (1938) 5 LAW & CONTEMP. PROB. 544.

debtor was calculated. The method usually employed was to credit the mortgage debtor with the proceeds of the public sale, whether it took place out of court or by judicial decree. Sale was usually to the highest bidder without minimum price restrictions. It is true that courts of equity, with their power to supervise mortgage sales and to refuse confirmation of unconscionable sales, could order re-sale. But this power was rarely if ever asserted when the sole ground for relief was grossly inadequate bidding. Further evidence of fraud than this was required.¹¹ What relief was afforded was usually only available if asked for promptly. For most purposes, once the sheriff's deed was given, the title was unassailable.¹² And it seemed to follow, in the thinking of the courts, that not only was the title absolute, but the price as well was absolute in determining the credit to be allowed the mortgage debtor in computing his deficiency.

Early in the nineteenth century, American courts (departing from pre-existent English practice) adopted the practice of ordering a public sale of the mortgaged premises upon foreclosure, instead of vesting title in the mortgagee by strict foreclosure. This practice, it seems clear, was adopted for the supposed benefit of the mortgagor, to prevent the mortgagee from obtaining full title to the property that might be worth many times the amount of the mortgage debt. It was certainly not intended to affect the debtor's position adversely. It was probably assumed that, at the time of the sale, the property would usually bring more than the mortgage. The assumption was doubtless well founded in a period of rising land values;¹³ but the technique did not afford sufficient protection to the debtor in depression times (and they were frequent) when current market price would slip below mortgage debt, and foreclosures were most common. In these times, the technique of sale made bad matters worse for the debtor. All this resulted from the fact that courts permitted the mortgagee to participate in the bidding and purchase of the property. His presence as a bidder at the

11. See Note (1934) 82 U. OF PA. L. REV. 261.

12. The reluctance of many modern courts to extend the sphere of their discretion in dealing with sheriff's sales may be illustrated by the situation in Pennsylvania. In *Hettler v. Shephard*, 326 Pa. 165, 191 Atl. 581 (1937), it was held that the sheriff's sale might be set aside where the purchase price was grossly inadequate, and the decision was at the time thought by some to represent a major departure in Pennsylvania practice. But in *Knox v. Noggle*, 328 Pa. 302, 196 Atl. 18 (1938), the doctrine of *Hettler v. Shephard* received a drastic limitation; the time for moving for resale on the grounds of inadequacy of price was confined to the brief period after sale and before delivery of the sheriff's deed. In a similar vein, the highest court of New York in *National City Bank v. Gelfert*, 284 N. Y. 13, 29 N. E. (2d) 449 (1940) repudiated the doctrine of *Monaghan v. May*, 242 App. Div. 64, 273 N. Y. Supp. 475 (2d Dep't 1934), and held that assessment of damages on a deficiency judgment was an automatic procedure following sale of the property, and not subject to equity supervision to determine the fairness of the assessment. Such decisions as that of *Suring State Bank v. Giese*, 210 Wis. 489, 246 N. W. 556 (1933) are exceptional.

13. Accountable largely to the growth in population.

sale would discourage other bidders,¹⁴ if they felt that the amount of the mortgage was more than the market price of the property, usually the case in depressions. They knew that the mortgagee would not permit his security to be sacrificed to bargain hunters, and thus were discouraged from making any bid at all. Consequently, there was a high percentage of cases where property was knocked down to the mortgagee, the sole bidder, at a nominal bid. He would then, in accordance with the assumption that the value of the property had been established, be entitled to claim a deficiency of the entire claim less the nominal bid.

This practice of nominal bidding (strong even in fairly good years, almost universal in bad), deprived the sheriff's sale price in most cases of any relationship to the mortgage price. With the steady growth in nominal bidding in recent years came a decline in respect for public sale as a means for assessing the debtor's liability.

The present writer has had occasion to make a count of sheriff's sales in Philadelphia from 1800-1940, and determined the rate per thousand population for all the years of this period. With this as a background, it was possible to select certain years to make an analysis of sheriff's sale bidding. The years chosen were years of normal or less than normal foreclosure activity, and the results obtained, it is believed, indicate the nature of sheriff's sale bidding in years of good competition:

	100% or more of claim bid	50 to 100% bid	10% to 50% bid	less than 10% bid
1860 ¹⁵	33%	11%	24%	32%
	319	109	236	312
1870	45%	14%	20%	21%
	390	127	174	185
1910	36%	9%	13%	42%
	301	72	111	350
1920	62%	7%	8%	23%
	259	28	33	95

Even in these fairly good years, however, a certain unhealthy tendency of sheriff's sale bidding may be noticed—a tendency of sheriff's sales to bring a nominal price except where the bid was above

14. See Tierney, "Fair Value" and the Deficiency Judgment (1940) J. OF LAND AND PUBLIC UTILITY ECONOMICS, 181, 188, for an explanation of a third-party bidding at foreclosure sale.

15. Only ten months of the year 1860 were counted. The figures represent the number of cases in each category, and the percentages are of the total number of cases examined during the given year.

the entire amount of the claim. This tendency of sheriff's sale prices toward the minimum unless they are in excess of the amount of the claim, would seem to be attributable to the discouraging presence of the mortgagee at the sale. It seems clear consequently that unless the sheriff's sale price is above the amount of the claim, it has no necessary relationship to the current market price of the property.

For these same test years, a count was also made of the number of nominal bids—arbitrarily set at \$100 or less. Doubtless there was a considerable number of cases where a bid of one hundred dollars or less would be more than a nominal bid, in view of the small value of the property, but it is probable that the value of the property was generally much in excess of a bid of one hundred dollars or less. In 1860 the percentage of nominal bidding was 44; in 1870, 35; in 1910, 50; in 1920, 25.¹⁶

It may thus be seen that nominal bidding, even in good years, was very frequent at sheriff sales. In the last depression, however, nominal bidding rose to such a proportion that it was virtually the universal practice. Even in 1928, fairly early in the Philadelphia real estate collapse, nominal bidding occurred in approximately 84 per cent. of all sheriff's sales.¹⁷ The percentage mounted steadily thereafter—in 1929 to 88 per cent.; in 1930 to 89½ per cent.; in 1934 to 97 per cent.¹⁸ In other words, there was practically no competitive bidding at sheriff's sales: this because mortgage prices had generally slipped below the price of the mortgage claim. The enormity of this is illustrated by the fact that in the worst year of Philadelphia's greatest previous real estate depression, 1879, nominal bidding occurred in only 40 per cent. of the cases;¹⁹ and in 1899, the worst year in another recent Philadelphia depression from 1895-1900,²⁰ nominal bidding occurred in 58 per cent. of the cases. So complete was it that following practically every foreclosure in the last depression, the mortgage debtor became liable (after deduction of the ridiculous sum of \$50) for the entire principal, costs, and commissions of the creditor's claim. The last depression furnished the final, complete *reductio ad absurdum* of the fiction that a sheriff's sale, with a mortgagee bidding, conclusively determines market price of security and deficiency claim.

16. The number of instances in which nominal bids occurred during each of these years was as follows: in 1860 (ten months), 433; in 1870, 314; in 1910, 435, in 1920, 110.

17. Of 7771 cases examined, in 1245, the bids were over the minimum.

18. The number of instances in which nominal bids occurred during each of these years was as follows: in 1929, 9353 of 10635; in 1930 (six months), 5944 of 6642; in 1934 (six months), 6879 of 7080.

19. During the six months from January to June of this year nominal bids occurred in 1240 of 2604 cases. The figure in the text represents a corrected percentage.

20. During the three months from January to March of this year nominal bids occurred in 464 of 798 cases. The figure in the text represents a corrected percentage.

EARLY ATTEMPTS TO PREVENT NOMINAL BIDDING

It must not be supposed, however, that attempts to prevent the practice of nominal bidding are of recent origin, and that it was not realized in former times that the sheriff's sale was a very inaccurate barometer of market price. The statutes of the period of Confederation (often referred to in judicial discussions on the impairment of contracts' clause) frequently have preambles describing the collapse of the real estate market at that time and the inability of public sales, on account of the scarcity of money, to bring more than meagre prices.²¹ One of these statutes, as a matter of fact, went so far as to provide for appraisal of real property before sheriff's sale and to forbid sale of real property on bids below three-fourths of appraised value.²² Since that time, especially in the depression periods, there have been many legislative attempts to prevent nominal bidding. There was a wave of legislation in the nineteenth century providing for appraisal before sale and further providing that property must bring two-thirds of the appraised value. This type of act was undoubtedly modeled after the Louisiana legislation of 1805,²³ passed shortly after the inclusion of that state in the Union. Under the terms of the Louisiana practice, the sheriff conducting the judicial sale was directed to select two residents of the county in which the property was located to assist him in appraising it, and it was further provided that no property should be sold at first public offering for less than two-thirds of the appraised value. If the bidding did not bring this amount, a second offering was to be made, and the property could then be sold at one-half of its appraised value.

Since many states modeled their reforms after this Louisiana legislation, it is interesting to inquire into the origin of Louisiana practice. The practice codes, of which these provisions are a part, were prepared by Edward Livingston and several collaborators, but these provisions did not originate in their imagination. They are to be found in the pre-existing colonial practice of the state, which was a mixture of French and Spanish law. We are indebted to Mr. Henry P. Dart of

21. For example, the preamble to a Rhode Island Act, ACTS AND RESOLVES, 1786 STAT. 14. ". . . whereas it frequently happens that great Distress arises to Individuals and their Families from the Sale of Property at Public Vendue to satisfy Creditors, whereby the Product usually bears a small Proportion to the real value. . . ." A Pennsylvania Statute (11 PA. STATS. AT LARGE, 1782, c. MVIII, Sec. IV) has this in its preamble: ". . . whereas the scarcity of gold and silver hath caused the value of lands and tenements in most parts of this state to fall vastly below the real value of the same, and if compulsory sales were to be made of such lands and tenements it is probable they would fall short by paying the debts which they were at first supposed a sufficient security for, to the injury and oppression of both creditor and debtor." 10 VA. STAT. (Hening, 1781) c. XXII; 1 MD. LAWS (Kilty, 1782) c. LV; 4 S. C. STAT. (1782) p. 513.

22. 12 VA. STAT. (Hening, 1787) c. VII, § 5.

23. LA. ACTS 1805, c. 25, § 9; c. 26, § 14.

the Louisiana Bar for discovering that the two-thirds rule may be found in the following provision of *Febrero Adicionado*:

"The bidding shall proceed with complete and absolute freedom; for if fraud is committed or the bidders are impeded, the debtor has an action of fraud against the perpetrators thereof because it results in injury to him. And in order to prevent any allegation of lesion beyond moiety, the first bid need not be admitted unless it exceed two-thirds appraised value according to the practice observed in this court as to the judicial sale of real property and even to some moveable property."²⁴

This statement would seem to explain and supplement the provision of the Code O'Reilly,²⁵ the Colonial-Spanish practice code in force at the time of Louisiana's incorporation into the Union which, rather oddly, provided for appraisement of property before sale, but also provided that sale should be made to the highest bidder. Mr. Dart states: "It is . . . probable that the rule of practice requiring a two-thirds appraisement and fixing an upset price as provided in C. P. 680 is based on the law against lesion and is really of Roman origin."²⁶

The two-thirds rule may be found in the laws of several Spanish-speaking nations. It is present in Spanish practice, where the proceeding for appraisement and sale is called "apremio".²⁷ It may also be found in Mexican practice.²⁸ Outside of the single example of Colonial legislation previously referred to, there appears to be nothing quite similar in pre-existing Anglo-American practice. The nearest approach would seem to be requirements for appraisement to determine whether the profits of real estate would be sufficient to justify sequestration or whether the property, on the other hand, should be sold. There was also provision for appraisement in some states to determine the amount of a deficiency judgment after strict foreclosure had fixed absolute title to the premises in the mortgage creditor. In the states which adopted it, this two-thirds-value legislation was applied not only to execution sales at common law, but also to mortgage foreclosure sales. Statutory provisions of this character were passed in many states during depression periods. The situation that led to Kansas legislation of this type is set forth in the important case of *Beverly v. Barnitz*.²⁹

24. FEBRERO ADICIONADO, Book 3, Chap. 2, § 5 at 497, No. 327 (LIBRERIA DE ESCRIBANOS ABOGADOS Y JUECES, published by Don Jose Ferrero in 1786).

25. *Instructions as to the manner of instituting suits—Civil and Criminal* (1841) SCHMIDT'S LA. LAW JOURNAL, 27, 34, 35.

26. From a letter in possession of the author.

27. 32 COMMERCIAL LAWS OF THE WORLD (Spain) 68.

28. WHEELER, COMPENDIUM OF THE LAWS OF MEXICO (Rev. ed. 1938) art. 781.

29. 55 Kans. 466, 42 Pac. 725 (1895).

In the course of the last century a large number of states adopted this type of legislation.³⁰ The statutes, though obviously derived from a common source, had many differences. In some states, sale for less than two-thirds, one-half, or three-quarters of the appraised value (the fraction varied) was made entirely impossible by provision for offerings *ad infinitum*. In other states, eventual sale to the highest bidder without minimum price restriction was stipulated where one or more offerings did not realize the upset price. In that case, however, the mortgage debtor was sometimes given the right to redeem at sale price within a specified time. The statutes are similar in their rough method of appraisal: two or three freeholders of the community were to be chosen to appraise the property, either by themselves or with the officer conducting the sale. The problem was not committed to experts or even to a court or jury. Much bias and inaccuracy could thus be expected. The Ohio rule is noteworthy in that it apparently grows out of court practice, only later reenforced and authorized by statute.³¹

Possibly because the method used to appraise the property was so rough that it was not conducive to fair appraisal, the statutes were not well received by the courts. As applied retroactively, the minimum price provisions were usually held unconstitutional.³² Prior remedies, in the thinking of the courts, had been altered to the point where there had been serious interference with the mortgagee's rights.³³ As applied prospectively, the statutes were not efficacious, for draftsmen simply inserted provisions in new mortgages waiving appraisal, as exemptions had been waived in the past. Speaking in terms of liberty of contract, courts were willing to uphold waiver provisions, although the net effect was to hamstring the party in the inferior position and to defeat the purpose of the legislation. Eventually a few state legislatures repealed their appraisal laws.³⁴

OTHER EFFORTS TO SOLVE THE PROBLEM IN THE NINETEENTH CENTURY

Other legislation in the nineteenth century was directed at solving the deficiency judgment problems of the mortgagor. Statutory provi-

30. Ark. Acts 1879, p. 94, § 1 as amended by Ark. Acts 1883, p. 157. Ill. Laws 1840, p. 172. Iowa Rev. Laws 1860, p. 610, § 3360. Terr. Kans. Laws 1858, p. 136, § 434. Ky. Laws 1851-2, p. 110. La. Stat. 1805, pp. 174-242. Mich. Laws 1841, § 1-2. Neb. Laws 1858, p. 182, § 447, taking the place of Neb. Laws 1857, p. 77, § 25. Okla. Stat. (McCartney, Beatty, Malcolm, 1893) § 4346-8. Pa. Laws 1842, p. 407; Pa. Laws 1877, p. 29. Tenn. Laws 1820, c. 11. Wash. Laws 1897, p. 70.

31. Anonymous, 1 Ohio, (1 Ham.) 235 (1821).

32. Gantly's Lessee v. Ewing, 3 How. 707 (U. S. 1845); McCracken v. Heyward, 2 How. 608 (U. S. 1844); Bronson v. Kinzie, 1 How. 311 (U. S. 1843); Robards v. Brown, 40 Ark. 423 (1883); Rosier v. Hale, 10 Iowa 470 (1860).

33. Broadwell v. Rodrigues, 18 La. Ann. 68 (1866); Craig v. Stevenson, 15 Neb. 362, 18 N. W. 510 (1884).

34. Wash. Laws 1899, c. LII, p. 85; Neb. Laws 1915, c. 149, p. 319.

sion allowing the mortgage debtor the right to redeem property after sheriff's sale frequently set the redemption price as the amount of the sale price, plus interest and costs, rather than the amount of the mortgage debt. Where such legislation was in force, there was doubtless a general tendency for creditors to bid a substantial, rather than nominal, amount at the sheriff's sale, to avoid the possibility that the mortgagor would redeem for less than the assumed fair value.

New Jersey modeled its legislation after the English law. In England, there is really no deficiency judgment.³⁵ The mortgage creditor has several remedies: (1) the right to take possession of premises upon default and eventually acquire title thereto by the running of a period of limitation on the debtor's right to bring a bill of redemption; (2) the right to sue on the covenant and take judgment for the full amount; (3) the right to obtain a decree of strict foreclosure fixing title in the petitioner without sale; (4) the right to sell the property to a third party without judicial action. But it was not possible for him to acquire the property and claim the money too. Recourse to personal liability after strict foreclosure would reopen the foreclosure and revive the debtor's right to redeem. Recourse to personal liability after the exercise of the power to sell was impossible: the title had passed to a third party, and the foreclosure could not be reopened. Thus, English courts avoided the unfairness of the American judicial sale practice of allowing the mortgagee to bid in the property at a nominal sum, derive absolute title, and make claim against the debtor for an enormous deficiency. The English creditor could have his title by strict foreclosure, but if so he must abandon his claim on the debt. Or he could sell the property to a third party—lose the property—and then sue on the covenant. But he could not have both property and claim at the same time. In New Jersey the device of reopening the foreclosure sale in case a mortgage debtor purchased the premises and then took judgment on the note or bond was adopted, doubtless in imitation of the prior English practice. This New Jersey legislation begins with the Statute of 1880,³⁶ passed immediately following the most disastrous decline in real estate values in the history of that state, and the resultant collapse of sheriff's sale prices.

RECENT PROVISIONS REENFORCING EQUITABLE DISCRETION

In the light of the experience of the last century, neither the problem of unfair deficiency judgments nor attempts to remedy the

35. See Turner, *An English View of Mortgage Deficiency Judgments* (1935) 21 VA. L. REV. 601.

36. N. J. Acts 1880, c. CLXX, p. 255, as amended N. J. Acts 1881, c. CXLVII, p. 184. The background of the statutes is set forth in *Pennsylvania Co. v. Marcus*, 89 N. J. L. 633, 99 Atl. 405 (1916).

situation are new. The variety of measures adopted by legislatures in the last depression is simply the overflow from old springs of experience. The remedies tried in the last depression are simply later varieties of a common species. Some of the variety, as a matter of fact, is attributable solely to legislative ingenuity in attempting to escape the restrictions placed about legislatures by courts which were ever mindful of constitutional limitations.

Some of the state legislatures attempted to reenforce the equity functions of courts in handling foreclosures by authorizing them to exercise their inherent equitable discretion to prevent nominal bidding. The legislation of Michigan,³⁷ Arkansas,³⁸ and Washington³⁹ is of this type. In Arkansas, the court was authorized to postpone foreclosure of mortgages executed prior to January 1, 1933, if it was made to appear that a better price could be obtained at a later time. Under the same circumstances a court could order re-sale upon the motion to confirm. In Michigan, the court was empowered to fix an upset price on real property before sheriff's sale. In Washington, the court was authorized to fix a minimum price or upon application for confirmation to require that the fair value of the property be credited.

Such an approach constituted a direct assault upon conventional sheriff's sale practice.⁴⁰ It connected the question of the amount of the deficiency judgment to be obtained with the question of the finality of the sheriff's sale. It made it necessary for the mortgagee to bid an upset price or to prove upon motion to confirm that what he bid was the fair value of the property. This approach to the problem tended to complicate the process of realizing upon the security, even in cases where the mortgagee was not interested in obtaining an exorbitant deficiency decree. Naturally the procedure authorizing courts to refuse confirmation in cases of sales for an inadequate price was available only in those states where confirmation of a foreclosure sale by judicial decree was required. In states like Pennsylvania and, it would seem, New York,⁴¹ confirmation of the sale was not necessary. The sheriff's deed to the property was given without question within a few days after sale. In such states, therefore, any legislation requiring a hearing to determine fair value before confirmation of the sale would have disrupted the prior practice to a considerable extent.

37. Mich. Acts 1933, No. 229, p. 357.

38. Ark. Acts 1933, No. 21, p. 47.

39. Wash. Laws 1935, c. 125, p. 374.

40. Other legislation of similar import was passed in South Dakota, Laws S. D. 1939, p. 181, authorizing court to fix upset price; in Kansas, Kans. Laws 1933, c. 218, p. 321, authorizing court to fix upset price or refuse combinations; and in Pennsylvania, II Pa. Laws 1937, No. 561, p. 2751, requiring establishment of upset price (declared unconstitutional).

41. National City Bank v. Gelfert, 284 N. Y. 13, 29 N. E. (2d) 449 (1940).

RECENT LEGISLATION ALLOWING THE DEBTOR CREDIT FOR THE
FAIR VALUE OF PREMISES FORECLOSED

Other legislatures, in their attempts to alleviate the situation, did not interfere with the established conduct of sheriff's sales. The validity and security of the sheriff's sale's title remained as before, but the price obtained through a sheriff's sale was abandoned as a test of the deficiency. For the sheriff's sale's price was substituted the "fair value" of the premises, to be deducted from the claim to determine the deficiency.⁴² If the foreclosure was in a court of equity, the court was instructed, upon application for a deficiency decree, first to ascertain the fair value, and then to grant a decree for the difference between claim and fair value. If the foreclosure was by exercise of the power of sale out of court, the mortgage creditor, upon his suit for a deficiency in a court of law, was entitled to judgment only for the difference between claim and fair value. In Pennsylvania, where the procedure of *scire facias* is popular, the creditor would lose all claim to a deficiency unless he moved within the stipulated time for an appraisal of the property and the determination of the amount fairly due.

The chief weakness of these statutes would appear to be that they speak in terms of "fair value", but usually set forth no definition of "fair value". The determination of "fair value" was a difficult, nebulous problem. In California, the court was instructed to apply to an inheritance tax appraiser of the estate for his assessment of the property involved. In South Carolina, the "fair value" was to be determined by three appraisers, one to be appointed by the creditor, one by the debtor, and the third by the court. In other states, "fair value" was to be determined either by judge or by jury. But in any event, whoever was to make the determination, there were no instructions set forth in the statutes to define and clarify the meaning of that rather vague term.

And yet this was the most important problem. If fair value meant current market value, the mortgage debtor would probably be afforded ineffective relief. He would, of course, escape being credited merely with the nominal price bid. But in days of extremely depressed mortgage prices, he would still be liable for a considerable deficiency. On the other hand, if fair value meant potential or future value, the

42. Ala. Gen. Acts 1935, No. 146, p. 184. Cal. Stats. 1933, c. 642, p. 1669. Ga. Laws 1935, No. 412, p. 381. Idaho Laws, 1933, c. 150, p. 229. Mich. Pub. Acts 1937, No. 143, p. 217. N. J. Laws 1933, c. 82, p. 172, N. J. Laws 1935, c. 88, p. 260. N. Y. Laws 1933, c. 794, p. 1618; Laws 1934, c. 277, 562, pp. 783, 1236; Laws 1935, c. 268, p. 742; Laws 1936, c. 87, p. 347; Laws 1937, c. 83, p. 137; Laws 1937, c. 705, p. 1599; Laws 1938, c. 510, p. 1288. Okla. Laws 1941, p. 35. Acts & Vetoes, Spec. Sess. Pa. 1933-4 p. 243; Laws Pa. 1935, No. 197, p. 503; Acts July 16, 1941, No. 151. S. C. Acts 1933, No. 264, p. 350. S. D. Laws 1937, c. 208, p. 277.

market price that the property might bring in later prosperous years, the mortgage creditor could justly complain that he would be forced to take the property instead of cash, and keep it for years, probably at some expense, awaiting that bright day when the hopes of this potential future value might possibly be realized. And apart from this, it is patent that there can be no indisputable agreement among people as to what present value is, or future value, of property with the unique and peculiar qualities of improved real estate. Thus it was quite possible that one judge or jury would find that the value of real estate on a particular date was \$2,000, and another \$3,000 or \$4,000. When the problem was submitted to a jury, which would expectably be composed of the poorer members of a community who would be sympathetic to debtors, there was a clear chance of abuse. The nineteenth-century legislation attempted to guard against possibility of unfairness by providing that only two-thirds of the appraised value need be bid upon property. But the twentieth century legislation provided that the full fair value should be credited against the deficiency.

The decisions of the courts in construing the phrase "fair value" were not particularly helpful. In the case of *Heiman v. Bishop*, the New York court ruled that the pre-depression method of determining market value had become inapplicable to the depressed conditions existing in that state, and blandly asserted:

" . . . the court should receive evidence of the age and construction of the buildings on the premises, the rent received therefor, assessed value, location, condition of repair, the sale price of property of a similar nature in the neighborhood, conditions in the neighborhood which affect the value of property therein, accessibility and of all other elements which may be fairly considered as affecting the market value of real property in a given neighborhood."⁴³

With such evidence before it, the trial courts, in the exercise of their best judgment, should determine the market value of the premises in the existing circumstances. With all respect to the New York court, it is submitted that such instructions merely conferred unlimited discretion upon a trial court to determine the amount to be credited.⁴⁴ From a practical point of view, of course, it is clear that in the vast majority of cases a mortgage loan placed upon the property was considered to be amply protected at the time it was created. The worst that could happen to the creditor, in this attempt to determine fair value, would be that the fact-finding body would determine the

43. 272 N. Y. 83, 88 (1936).

44. For further discussion of the meaning of the term "Fair Value" as applied to deficiency judgments see Tierney, *loc. cit. supra* note 14.

amount of the fair value to be in excess of or equal to the amount of the claim; in either case, the creditor would not be liable to the debtor. He would simply be unable to collect anything in addition to the property from the debtor.

To afford protection to the debtor, it was necessary that the deficiency-judgment statutes be framed so as to compel the creditor to foreclose first upon the security, or to provide for appraisal of other assets attached in the event that the creditor pursued his remedy at law and attached other property first. In the Pennsylvania statute of 1935, express provision compelled the creditor to foreclose first. A similar provision appeared in the Alabama legislation. In most other states in which deficiency-judgment acts were passed, the preexisting law of the state made it necessary for the mortgage creditor to foreclose upon the security before recourse to the personal indebtedness. In the Pennsylvania Act of 1941, it is not necessary for the creditor to foreclose before attaching other assets of the debtor, but provision is made for appraisal of any real assets attached by any judgment creditor, secured or unsecured. Clearly some provision is necessary to prevent the creditor from profiteering at the expense of a debtor by proceeding against other assets subject to execution without restriction.

Most of the deficiency-judgment statutes were both retrospective and prospective in character. In so far as they related to preexisting mortgages, they were relief measures; in so far as they related to mortgages created subsequent to enactment, they represented permanent changes in the substantive law of mortgages.

If, however, the appraisal technique created is to be permanently effective, provision must be made against waiver. Statutes providing for inquisition of real property before sale, for debtor's exemption, for appraisal and sale at not less than two-thirds of appraised value, have been made virtually meaningless by judicial permission of waiver in mortgage contracts. The same fate may well attend these latest deficiency-judgment statutes in all states where the statute involved does not expressly stipulate that waiver is against public policy. The wisdom of such a provision in the latest Pennsylvania Deficiency-Judgment Act is manifest.

The efficacy of the statute may also depend upon properly placing the responsibility for appraisal. If the mortgagee is entitled to the difference between sale price and claim, unless the mortgagor moves for an appraisal, it is expectable that the mortgagor, being in distressed circumstances, will not be able to secure the services of an attorney to advise him of his rights or to represent him at a hearing. The immediate expense involved may not seem to warrant an attempt to reduce

the indebtedness. Even if the mortgagee is the responsible party to make the motion for appraisal, the burden may none the less be upon the mortgagor to answer, and if so the same difficulties will arise. It would seem that the only sure way of protecting a distressed mortgage debtor would be to direct the court on its own initiative to make a finding of fair value, as a condition precedent to a deficiency judgment. This is the case in Connecticut. It should not be unnecessary for the mortgagor to appear with counsel; the court should be satisfied by independent inquiry that the amount credited represented the fair value of the premises foreclosed.

Thus it would appear that there are many objections to the typical deficiency judgment statutes: (1) They compel the creditor to take the security instead of cash, regardless of the ability of the particular debtor to pay the full amount in cash; (2) they provide for appraisal of property at a so-called fair value—not defined by the statutes, and not capable of exact definition—leaving ample room for abuse of discretion by the fact-finding body; (3) the debtor may have protection only by participating in a legal controversy; (4) waiver may destroy the value of the statutes. With all of these objections, however, it may still be fairly argued that anti-deficiency judgment statutes, if applied retroactively as well as prospectively, would result in more good than harm because of the widespread practice of nominal bidding and the vast amount of unfairness which is latent in the old system of allowing credit merely for the foreclosure price.

RECENT PROVISIONS ELIMINATING DEFICIENCY JUDGMENTS

Some legislatures went further: they provided that under certain or all circumstances a deficiency judgment would not be available to the creditor.⁴⁵ The Arizona Act of 1933 deprived the mortgagee of the right to a judgment *in personam* for more than the amount realized from the sale of the mortgaged property, unless he was able to show at trial that the value of the property when the note and mortgage were executed was not in excess of the amount remaining due on the note, or that whatever depreciation had taken place in the property was the result of some act of the defendant or the original mortgagor. Even with such showing, however, the amount of his claim was limited to the difference between the original value of the property less depreciation and the claim. As the court said in *Kresos v. White*:⁴⁶ "The

45. REV. CODE OF ARIZ., ANN. (Supp. 1935) §§ 23-24. Ark. Acts 1933, No. 57, p. 158 (held unconstitutional). CAL. CODES AND GEN. LAWS (Deering, Supp. 1939) § 580 c. 3 LA. GEN. STAT. (Dart., 1939) §§ 5021.6-5021.7. 4 MONT. REV. CODES (1935) c. 132, § 10255. Neb. Laws 1933, p. 247. S. D. Laws 1933, c. 138.

46. 47 Ariz. 175, 177, 54 P. (2d) 800, 801 (1936).

practical effect of this statute is to do away with deficiency judgments." Other statutes were of even stricter import. In Louisiana, it was provided that any creditor who took advantage of a contract of waiver depriving the debtor of a right to appraisal and sale for not less than two-thirds of the appraised value, would not be able to collect a deficiency. In South Dakota, deficiency judgments on mortgages thereafter created were abolished. The act was amended to exclude from its coverage purchase-money mortgages. In California, a deficiency judgment on mortgages thereafter created was forbidden in case the mortgagee exercised his power of sale out of court. In Arkansas and Nebraska, deficiency judgments were prohibited; and in Montana, the prohibition was confined to deficiency judgments on purchase-money mortgages thereafter executed.

The Commissioners on Uniform State Laws, in their proposal of a Model Power of Sale Act, have adopted the principle of eliminating deficiency judgments.⁴⁷ From a practical point of view, it would seem that this technique has much to commend it—it avoids the uncertainties and delays in determining vague "fair value". The mortgagee may be compensated (as is proposed in the Model Power of Sale Act) by a speedy and sure remedy on the security. But to deprive the mortgagee entirely of recourse to the personal liability of a debtor may sometimes result in considerable unfairness. Knowing that they would not be personally liable, dishonest mortgage debtors may be encouraged to exhaust the property, and may refrain from paying the creditor in many cases where they could and would, if the creditor had it within his power to threaten recourse to the debtor's liability. Possibly a better solution would be a provision limiting the creditor's right of recourse to a claim for interest and costs, including waste and taxes. It is usually fair to assume that the parties at the time of their bargain contemplate that the principal borrowed is fully protected. But it would be unfair to say that they contemplate that all future interest and other claims are likewise protected by the security.

RECENT PROVISIONS LIMITING THE LIFE OF JUDGMENTS ON MORTGAGE DEBTS

A further solution advanced by some legislatures is to restrict the life of a deficiency judgment.⁴⁸ The normal rule that a judgment can be revived as long as the debtor lives has been abolished in Iowa and

47. *Model Power of Sale Mortgage Foreclosure Act*, HANDBOOK OF THE NATIONAL CONFERENCE OF COMMISSIONERS ON UNIFORM STATE LAWS AND PROCEEDINGS (1940) 254-264.

48. OHIO CODE ANN. (Throckmorton's Baldwin, 1940) § 11663-1; IOWA CODE (1939) § 11033-3.

Ohio in so far as mortgage indebtedness is concerned. In Ohio, it is now provided that a deficiency judgment obtained upon foreclosure of a mortgage on a home or farm is only collectible for two years, and at the end of this time cannot be revived. Thus the creditor is empowered to exhaust the debtor's discoverable assets for two years, but cannot hold the judgment over the debtor's head *in terrorem* for the rest of the debtor's life. An even broader provision exists in Iowa: the life of the judgment is restricted to a period of two years regardless of the type of mortgage involved.

Such provisions, at least, eliminate one of the most grievous aspects of deficiency judgments—the existence of uncollectible judgments over long periods of time, judgments which injure the debtor's credit without much benefit to creditors. They make it unnecessary for the debtor to seek bankruptcy in order to remove the liability. Of course, they do not eliminate the possibility that the debtor may lose his entire property in the meantime.

PROBLEMS IN CONSTITUTIONALITY

Against this avalanche of change, aggrieved creditors tried to throw up the barrier of the Constitution. There were several clauses in the federal and state constitutions which were invoked, but the most usual ground for objection was based on the impairment of the obligation of contracts clause of the Federal Constitution, and similar clauses in state constitutions. A very plausible argument can be made that the framers of the federal instrument intended to forbid legislation of any sort that would automatically postpone the creditor's remedy or force him to take property instead of cash. There was a wide variety of such acts in the days of the Confederation, and the aim seems to have been to avoid recurrence.

Courts ordinarily inclined to strict construction would explain the meagre words of the impairment of contracts clause as they imagined their ancestors intended them, based upon extraneous source materials. These very courts, however, have refused to consider anything beyond the borders of the printed page in construing legislation.

The conservative approach to the problem of constitutionality was generally to consider what remedies were available to the mortgagee before the changes introduced, and then to decide whether the changes substantially altered the pre-existent remedies.⁴⁹ If so, it seemed to

49. In *Bennett v. Superior Court of Los Angeles County*, 5 Cal. App. (2d) 13, 42 P. (2d) 80 (1935), the District Court of Appeals of California for the Second District declared the 1933 Act requiring appraisal and limiting a judgment to the difference between appraised value and claim, unconstitutional, the court said: “. . .

follow automatically that the obligation of the contract had been impaired—for what obligation, they asked, is anything save for its legal remedy? It did not appear to matter whether the previous remedy was unfair, or whether the change introduced would be, ninety-nine times out of a hundred, fairer. The crux of the matter was simply that the former remedy was substantially changed. Such an interpretation of the Constitution is a phase of ancestor worship.

A more recent approach to a problem under the impairment of contracts clause would seem to be, that the Constitution does not (and may we say, cannot) prevent changes in a remedy even though substantial in character, which provide a fairer remedy than that previously existing. This is not intended to imply entire disagreement with some of the decisions of the state courts in holding particular legislation unconstitutional. For example, statutes entirely prohibiting deficiency judgments as applied to preexisting mortgages may amount, in some cases, to absolute confiscation of the mortgagee's property right in favor of the mortgagor. Such may utterly defeat the creditor's legitimate expectations of receiving a fair payment on his debt, and it has already been indicated that even "fair value" statutes are subject to some criticism on the ground that they may force the creditor to take property instead of cash. But the changes introduced were at the very least not more patently confiscatory to the creditor than the previous remedy had been to the debtor.

the operation of the statute . . . is far more than procedural. . . . The statute attempts to so affect the contract that only a portion of the indebtedness may be recovered notwithstanding the borrower of the money may well be able to pay in full. This certainly impairs the freedom of contracts." In *Adams v. Spillyards*, 187 Ark. 641, 61 S. W. (2d) 686 (1933), the Arkansas Act of 1933 providing that the plaintiff should not be entitled to a decree of foreclosure until he file a stipulation that he would bid the amount of the debt, interest and cost, so declared unconstitutional. In *Vanderbilt v. Brunton Piano Company*, 111 N. J. L. 596, 169 Atl. 177 (1933), the New Jersey Act of 1933 providing for appraisal to determine fair market value as a credit against the deficiency, was declared unconstitutional. The court called attention to the fact that this particular statute applied to cases where the property had been sold to a third party, and also to mortgages on business enterprises and speculative adventures as well as homes. In *Langever v. Miller*, 124 Tex. 80, 76 S. W. (2d) 1025 (1934), the Texas Act of 1933 providing for appraisal to determine fair value was declared unconstitutional. In *Klinke v. Samuels*, 264 N. Y. 144, 190 N. E. 324 (1934), the New York law of 1933 was declared unconstitutional, but emphasis was placed upon the temporary character of the legislation. Consequently in *National City Bank v. Gelfert*, 284 N. Y. 13, 29 N. E. (2d) 499 (1940), the permanent anti-deficiency-judgment act of 1938 was declared unconstitutional. In *Federal Land Bank v. Garrison*, 185 S. C. 255, 193 S. E. 308 (1937), the South Carolina Act of 1933, authorizing appraisal of the property to determine the deficiency judgment, was declared unconstitutional. In the language of the trial court, adopted by the Supreme Court: "To secure a deficiency judgment, in part at least, the medium of payment is changed from that of money to that of property. If, at the time of making a loan, he looked primarily to the financial ability of the mortgagor to respond to a judgment for the mortgage debt and was least concerned with his security and was not interested in purchasing the security at any price, under the terms of the Act he must accept the property at its true value upon foreclosure sale or secure a purchaser who will do so, although conditions may be such that a purchaser cannot be secured to pay any such price and the mortgagee may have to wait an indefinite length of time to secure such purchaser . . ."

The chief criticism of courts defeating legislative changes is that they rejected measures honestly aimed at correcting a grievous situation, and did not offer a better solution to the problem. On the one hand, they wielded the annihilating sword of constitutional interpretation; on the other hand, they refused to exercise their inherent power of equitable discretion to correct abuses. The equity that had devised the right of redemption after default, opposing law with justice, had frozen into immobility.

The decisions of the United States Supreme Court, upholding the anti-deficiency judgment acts of North Carolina and New York, have been liberalizing influences of great significance.⁵⁰ The impairment of contracts clause of the Federal Constitution no longer stands as a barrier to equitable change: it merely opposes changes that would, in a majority of cases, work a real hardship upon the creditors.

The last resort of antagonistic courts must be to their own state constitutions. Although the impairment of contracts clauses of state constitutions are generally modeled after the federal clause, state courts, naturally, are the final authority on their meaning and interpretation. They need not accede to the construction of the United States Supreme Court. In the somewhat comparable problem of moratory legislation, the Texas Supreme Court refused to regard the *Blaisdell* case as determining the meaning of the Texas impairment of contracts clause.⁵¹ The Supreme Court of Pennsylvania, on the other hand, is to be commended for bowing to the federal interpretation in the interest of uniformity.

In view of the decisions of the United States Supreme Court, it is to be expected that in many states where such legislation has been invalidated, there will be a renewed assault upon constitutional barriers, and a gradual relaxation of judicially imposed restrictions.

50. In *Richmond Mortgage and Loan Corporation v. Wachovia Bank and Trust Company*, 300 U. S. 124 (1937), the Supreme Court affirmed the decision of the North Carolina court in 210 N. C. 29, 185 S. E. 482 (1936), upholding the North Carolina legislation of 1933. This Act compelled a trustee or mortgagee who had sold the security out of court, to allow credit for the fair value of the property in his suit for a deficiency judgment. This decision could, of course, be limited to cases where another remedy (foreclosure in court) remained to the creditor without alteration. In *Honeyman v. Jacobs*, 306 U. S. 509 (1939), the Supreme Court extended its approval to Section 1083-A of the Civil Practice Code, providing that for a limited time the amount of a deficiency should be determined by ascertaining the fair value of the premises. This decision could likewise be limited to a case of temporary deficiency judgment statute passed in an emergency. But in *Gelfert v. National City Bank of New York*, 313 U. S. 221, (1941), the permanent New York Act of 1938, amending Section 1083 of the Civil Practice Act, was held not to violate the contracts' clause of the Federal Constitution. No really alternative remedy remained available to the creditor in this case, as it did under the North Carolina Act. Consequently, it would seem that the United States Supreme Court has given its full sanction to the principle of appraisal legislation. However, it should be noted that Mr. Justice Douglas in the *Gelfert* Case refused to indicate whether application of the Act to a case where a third party purchased the property would be constitutional.

51. *Travelers Insurance Company v. Marshall*, 124 Tex. 45, 76 S. W. (2d) 1007 (1934).

A SUGGESTED APPROACH

In considering the future of the deficiency judgment in the light of past legislative efforts, prediction is difficult because of the great variety of practices now existing, and because some of the measures were temporary in character. For example, in several states with moratoria on foreclosures, the taking or collecting of a deficiency judgment during the relief period was prohibited. As these manifestly temporary measures disappear, they leave in their wake the preexisting method of ascertaining deficiency judgments. But in New York, a permanent deficiency judgment statute was passed in 1938, modeled after the temporary deficiency-judgment statute which merely complemented the limited mortgage moratorium. There are thus some indications that with the disappearance of moratoria there will be increasing legislative attention to reform in deficiency-judgment practice. The question then arises, what is the best approach to the problem? What practice should be adopted in the future?

The existing methods, old and new, are so varied that they show a fundamental confusion. All are subject, in varying degree, to criticism on the grounds of unfairness or inadequacy. There is, therefore, ample room to propose another approach to the problem.

Distinction should first of all be made between cases where the mortgagee bids in the property at the sale, and cases where the property is sold to a third party. Where a third party bids in the property at a sale, it would seem that in all cases the sale price should be the amount credited against the claim—not a so-called “fair value”. The mortgagee, in that case, receives only the proceeds of the sale and not the property itself; it is impossible for him to realize more upon the security than the amount derived from the sale.

Where, however, the mortgagee, and not a third party, bids in the property at the sale, it is not realistic to view the sale price as conclusively determining the amount to be credited. On the other hand, it may well be argued that it is likewise unfair to insist that the mortgagee credit a so-called “fair value” of the property against the debt, because he may never derive that fair value from the property.

In cases where the mortgagee bids in the property at the sale, courts and legislatures should not treat the time of the sale as the occasion for conclusively establishing the deficiency judgment. In cases of defaulted mortgages held in trust, the time of the sheriff's sale is not regarded as the time for apportioning the proceeds between life tenant and remaindermen. A later time is chosen, the time when the trustee sells the foreclosed property to a third party. In England, where a mortgagee takes title by strict foreclosure (he is not permitted

to bid upon exercise of his power of sale) and then goes against the mortgagor on his personal liability, it has been held that recourse thereafter to the personal liability will reopen the foreclosure.

Accordingly the following proposal is made: (1) The sale price should conclusively determine the amount to be credited if the purchaser is a third party not connected with the mortgagee. (2) Where the mortgagee bids in the property at the sale, he may acquire full and absolute title to the premises, if he waives the claim for a deficiency. (3) If, however, he wants a deficiency claim, the title he acquires to the property should not be absolute, nor the sale price regarded as conclusively determining the amount of the deficiency. (4) The mortgagee should be entitled, in such a case, to attempt to collect the full amount of his claim after foreclosure from other property in the debtor's possession. (5) But in any case, where he acquires any property of the debtor's as a bidder at sheriff's sale, he shall be subject to an accounting for the use of that property until he sells it, and then must account for the proceeds of the sale to the third party. Thus, in effect, the mortgagee would be constituted merely a mortgagee in possession with power to sell, of any property which he had bid in at sheriff's sale, unless he waives his right to a deficiency judgment.

It is submitted that the result would be that the mortgagee would not be deprived without consent of the eventual possibility of full collection in cash. He would not be compelled to take the property in lieu of cash, as under the present appraisal statutes. The mortgagee could keep the property without being compelled to credit its so-called "fair value"; hold it for more auspicious times; then when sold, collect the difference between sale price and claim. On the other hand, the mortgagor would have the opportunity, as long as the mortgagee held the property, of obtaining bidders to purchase the property possibly at a price above the debt, and thereby protect himself from an enormous deficiency judgment. The amount of the deficiency would be determined by the cash obtained by sale to a third party, and not by sale at nominal bidding to the mortgagee himself. If the sale price turned out to be greater than the claim, the mortgagor would be entitled to the balance. This proposal, it would seem, is fairer than the older practice which favors the mortgagee, or than the more recent changes which favor the mortgagor.

Such a technique could be adopted by a court without legislative authorization. It would simply amount to a modernization of the equity of redemption, illogically considered terminated by sale in cases where the mortgagee bids in the property, through the absurd fiction that such a sale established the value of the premises. But, of course, a willingness to break with precedents would be necessary.

CONCLUSION

The clear need of mortgage law and practice is realism. There must be elements of adjustability in our techniques to accommodate law to the wide fluctuations of the real estate cycle. If, in creditor times, mortgage law and practice assume a rigidity, a lack of compromise, in the inevitable debtor times that succeed, the creditor's remedies will be broken by moratoria laws and deficiency judgment statutes that may seem hard on him. There must be in all times a self-operating balance wheel in law. For example, if amortization schedules are inelastic, if the same principal payments are due in bad years as in good years, we may expect a complete breakdown of our mortgage system in the form of vast liquidation or moratoria. And if public sale, regardless of the price provided, is regarded as the occasion for establishing deficiency judgments in all cases and times, we may expect that the unpopularity of the practice will lead to harsh legislative efforts to stamp it out in the next depression, as in the past.

With the possible exception of life insurance policies, the mortgage contract, of all types of legal instruments, is most in need of governmental supervision and control. We cannot leave the terms of the agreement to the parties themselves for there is really no freedom of contract; the parties are not in equal bargaining positions. The borrower signs a form contract at the dictation of a lender. In most cases, he does not know what it means. Even if he does, he cannot bargain with the large institution which lends money according to settled policies: he must take it or leave it. How unrealistic, then, it is to suggest that the borrower should insist upon the insertion of a clause waiving personal liability or providing for appraisal.

If the terms of the mortgage instrument are controlled by government, lenders will not stop lending. It is as necessary to lend as to borrow in a credit economy. A savings institution which does not place its funds faces liquidation. But we cannot depend upon a few isolated instances of intelligent borrowers to make changes in settled form contracts which are framed exclusively for the benefit of the lender.

The older practice of establishing a deficiency judgment has been defended on the ground that in the large majority of cases the creditor is not guilty of exploiting the possibilities of abuse. It is true that during depression years lending institutions collected only a small amount on personal claims. But there are still too many unsatisfied bonds, notes, and deficiency judgments. It should not be necessary for the debtor to rely upon the good will of his creditor. His protection should be a matter of law.