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Remedies for Waste in Missouri

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REMEDIES FOR WASTE IN MISSOURI

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I. INTRODUCTION

When the ownership of land is divided between one person who has possession and a second person out of possession who has a security interest in the land, the secured party often needs protection against improper conduct by the possessor. The possessor may remove or destroy an improvement on the land, thereby reducing the value of the security, or he may subject the secured party and himself to a risk of losing the land by not servicing senior encumbrances or not paying real estate taxes. The common law doctrine of waste theoretically affords the mortgagee a remedy for any damages inflicted on the property by the mortgagor before the debt is discharged.¹

Often a mortgagee's ignorance of his remedies for waste produces no serious consequences. The prolonged and increasing inflation over the past several decades, together with the utilization of more sophisticated and comprehensive security agreements, usually protect the mortgagee against waste committed by the mortgagor.² If waste occurs, the security agreement may provide that the mortgagee can accelerate the debt, foreclose, buy the pro-

1. For convenience, the words "mortgage," "mortgagee," and "mortgagor" used throughout this Comment also refer to "deed of trust," "beneficiary," and "trustor," respectively. This should be kept in mind, particularly in Missouri, where the deed of trust is used almost exclusively. The dearth of Missouri case law on the subject of waste necessitates the use of commentators and other state's case law on many points.

2. See R. POWELL & P. ROHAN, *POWELL ON REAL PROPERTY* ¶ 648 (abr. 1968).

erty at the sale, and, due to the property's increased value as a result of inflation, resell the property to recover the balance of the outstanding debt.³

Problems develop, however, for a mortgagee attempting to protect himself against waste committed on the secured property when the situation is not as described above. The most complex problems arise when the parties to a mortgage have not provided for waste or when such provisions are inadequate or ambiguous.⁴ In such cases, the mortgagee will not have available to him the acceleration, foreclosure, and sale remedy.⁵ Similarly, the waste may be so severe that it negates any inflationary increase in the property's value, or the mortgagor may default so soon after the loan that inflation has not increased the property's value. In either of these cases, even if foreclosure is available to the mortgagee, it will be inadequate because the property in its wasted condition will not produce enough proceeds at the foreclosure sale to satisfy the outstanding debt. In all of these situations, therefore, the mortgagee must seek either a deficiency judgment against the mortgagor for the unpaid balance of the debt or a personal judgment for waste.⁶ Either way, it is generally accepted that to protect the mortgagee and to give him the full benefit of his security, he should have all appropriate remedies for violations of his rights in the mortgaged property.⁷ This Comment examines the mortgagee's remedies for waste and concludes that the mortgagee's three principal remedies in a common law action for waste do not protect him adequately.

3. *Id.* See also G. LEFCOE, LAND FINANCE LAW 591 (1969); Leipziger, *The Mortgagee's Remedies for Waste*, 64 CALIF. L. REV. 1086, 1087 (1976). This is the ideal situation for the mortgagee. In this situation, the mortgagee does not suffer any increased risk or financial loss.

4. See Henchman, *Remedies of the Secured Creditor*, 10 U.W. AUSTL. L. REV. 20, 20 (1971).

5. See authorities cited note 3 *supra*. See also Hrovat v. Bingham, 341 S.W.2d 365, 368 (Mo. App., Spr. 1960) (if mortgage provided no power to foreclose, there could be no valid sale in attempted foreclosure). A mortgagee with no power to foreclose following the commission of waste on the mortgaged property would have only an action for damages or to enjoin future waste.

6. The mortgagee may not seek recovery for both a deficiency on the note and for the waste committed on the mortgaged property. Randolph v. Simpson, 500 S.W.2d 289, 292 (Mo. App., K.C. 1973). For a discussion of deficiency judgments in Missouri, see Nelson, *Deficiency Judgments After Real Estate Foreclosures in Missouri: Some Modest Proposals*, 47 MO. L. REV. 151 (1982).

7. See generally Wheeler v. Peterson, 331 S.W.2d 81, 83 (Tex. Civ. App. 1959) (action by mortgagee for damages to mortgaged land due to waste). A mortgagee has the following remedies for violation of his rights or interests in the mortgaged property: (1) a right to sue on the mortgagor's personal covenant for repayment contained in the security agreement, (2) a right to take possession of the mortgaged property, (3) a right to apply to a court to free the property of the mortgagor's equity of redemption, (4) a right to foreclose, sell, and sue for a deficiency, if any, (5) a right to appoint a receiver to collect the rents and profits, (6) a right to enjoin fur-

II. THE ACTION FOR WASTE

The common law action for waste finds its roots in the thirteenth century common law⁸ and statutes.⁹ The action is the result of a judicial balance of the conflicting interests of the mortgagee and the mortgagor by protecting the mortgagee's interest in the preservation of the value of the property securing the mortgagor's obligation.¹⁰ The action requires the mortgagee to establish three elements: (1) an act constituting waste, (2) done by one legally in possession, (3) that damages an estate or interest in the land of another.¹¹ The first and third elements have caused the most litigation.

A. *Act Constituting Waste*

The act of waste has been variously defined.¹² Most commonly, it is

ther wrongful conduct by the mortgagor, and (7) a right to damages. Greene, *Remedies of Mortgagees*, 110 LAW J. 458, 458 (1960). See also Lifton, *Real Estate in Trouble: Lender's Remedies Need an Overhaul*, 31 BUS. LAW. 1927, 1931-41 (1976) (remedies under state law). The mortgagee traditionally could pursue his remedies either concurrently or successively. See Henchman, *supra* note 4, at 21.

8. See Note, *The Doctrine of Waste and California Anti-Deficiency Statutes*, 7 GOLDEN GATE U.L. REV. 619, 619 (1977). For a discussion of the historical background of the law of waste, see R. POWELL & P. ROHAN, *supra* note 2, ¶ 637.

9. The text of the Statute of Marlbridge, 1267, 52 Hen. III, c.23, § 2 (1267), reads:

Also fermors, during their terms, shall not make waste, sale nor exile of house, woods, and men, nor of anything belonging to the tenements that they have to ferm, without special license had by writing of covenant, making mention that they may do it; which thing, if they do, and thereof be convict, they shall yield full damage, and shall be punished by amerceia-ment grievously.

The text of the Statute of Gloucester, 1278, 6 Edw. I, c. 5, § 3 (1278), reads:

It is provided also that a man from henceforth shall have a writ of waste in the Chancery against him that holdeth by law of England, or otherwise for term of life, or for term of years, or a woman in dower; and he which shall be attained of waste shall lose the thing that he hath wasted, and moreover shall recompence thrice so much as the waste shall be taxed at.

10. See Note, *supra* note 8, at 620. The obligation is usually more important than the security. An obligation can exist without security, but there can be no security without an underlying obligation.

11. *Jowdy v. Guerin*, 10 Ariz. App. 205, 208-09, 457 P.2d 745, 747-48 (1969) (elements for common law cause of action for waste set forth). See also *Hamman v. Ritchie*, 547 S.W.2d 698, 705 (Tex. Civ. App. 1977); cases cited note 14 *infra*. For purposes of this Comment, it will be assumed that the mortgagor has lawful possession.

12. For cases suggesting the variety of definitions of an act of waste, see *Finley v. Chain*, 374 N.E.2d 67, 77 (Ind. App. 1978) (overruled on other grounds in *Morris v. Weigle*, 383 N.E.2d 341, 345 n.3 (Ind. 1978)); *Chapman Drug Co. v. Chapman*, 207 Tenn. 502, 510, 341 S.W.2d 392, 396 (1960). See also 56 AM. JUR. *Waste* § 2, at 450 (1947); Note, *supra* note 8, at 620.

defined as unreasonable conduct by the owner of a possessory estate that results in physical damage to the real estate and substantial diminution in value of the estates in which others have an interest.¹³ Missouri courts have defined waste as an act that does lasting or permanent physical damage to the freehold and tends to destroy or lessen the value of other interests in the property.¹⁴ Applying this rule, courts have found waste when the possessor of mortgaged property cuts timber,¹⁵ or removes rocks, minerals,¹⁶ or permanent structures¹⁷ from the land.

Waste may be categorized further as voluntary or permissive. Voluntary waste, or commissive waste, is a deliberate act destructive to the mortgaged property.¹⁸ Tearing down a house or removing fixtures constitutes voluntary waste.¹⁹ All states allow a mortgagee to sue for this form of waste.²⁰ Permissive waste, on the other hand, implies a negligent act or failure to act that damages the mortgaged property.²¹ For example, failure to make necessary repairs may be permissive waste.²² Permissive waste may arise, however, absent physical damage to the property if the mortgagor fails to pay taxes or service senior encumbrances.²³ Missouri courts rarely have permitted a mortgagee to recover for permissive waste.²⁴

In order to understand waste, it is helpful to know what does not constitute waste. Waste does not occur when property decreases in value as a

13. *Pleasure Time, Inc. v. Kuss*, 78 Wis. 2d 373, 381, 254 N.W.2d 463, 467 (1977) (action by mortgagee against mortgagor for waste). *See also* *Halifax Drainage Dist. v. Gleaton*, 137 Fla. 397, 410, 188 So. 374, 379 (1939).

14. *Proffitt v. Henderson*, 29 Mo. 325, 327 (1860); *Miller v. Bowen Coal & Mining Co.*, 40 S.W.2d 485, 489 (Mo. App., K.C. 1931); *Deltenre v. Deltenre*, 152 Mo. App. 487, 491, 133 S.W. 632, 633 (K.C. 1911); *Hill v. Ground*, 114 Mo. App. 80, 85, 89 S.W. 343, 344 (K.C. 1905); *Davis v. Clark*, 40 Mo. App. 515, 520 (K.C. 1890). Although not all Missouri cases expressly state that physical damage is required, the clear import of the decisions is that it is necessary for a waste action.

15. *Proffitt v. Henderson*, 29 Mo. 325 (1860).

16. *Berns Constr. Co. v. Highley*, 332 F.2d 240 (7th Cir. 1964); *Kremer v. Crase*, 209 Wis. 183, 244 N.W. 596 (1932). *See* *Annot.*, 95 A.L.R. 957, 958 (1935); *Annot.*, 87 A.L.R. 1008, 1011 (1933).

17. *Stevens v. Mobil Oil Corp.*, 412 F. Supp. 809 (E.D. Mich. 1976).

18. *E.g.*, *Dorsey v. Speelman*, 1 Wash. App. 85, 88-89, 459 P.2d 416, 418-19 (1969) (removal of windows and cupboards by agents of mortgagor).

19. *See generally* authorities cited notes 15-18 *supra*.

20. *See* notes 14-18 and accompanying text *supra*.

21. *E.g.*, *Dorsey v. Speelman*, 1 Wash. App. 85, 88, 459 P.2d 416, 418 (1969) (general dilapidated condition of property due to lack of upkeep and maintenance).

22. *First Trust Joint Stock Land Bank v. Abkes*, 224 Iowa 877, 882, 278 N.W. 183, 186 (1938). *See also* *Erickson v. Rocco*, 433 S.W. 2d 746, 751 (Tex. Civ. App. 1968); *Weaver v. Royal Palms Assoc.*, 426 S.W.2d 275, 277 (Tex. Civ. App. 1968).

23. *See* *Stevens v. Mobil Oil Corp.*, 412 F. Supp. 809, 814 (E.D. Mich. 1976).

24. *See* notes 55 & 56 and accompanying text *infra*.

result of ordinary depreciation.²⁵ The "consumption" of the property under these circumstances is due to age, use, and the normal wear and tear on the property. Additionally, Missouri courts have held the destruction or removal of permanent structures or trees that enhance the value of the property not to be waste because the value of the other person's interest in the property is not lessened.²⁶ Also, the mortgagee cannot sue for waste if the use of the property was one the parties expected when the mortgage was executed.²⁷ Unless specifically excluded, such an expectation usually permits a mortgagor to use the land as it was used when the parties executed the mortgage, even though the premortgage uses involved removal of parts of the mortgaged property and reduced the value of the property.²⁸ One court even indicated that a mortgagor may do any act that an ordinary owner would do, regardless of whether it would be good husbandry.²⁹

B. *Damage to Mortgagee's Estate or Interest*

To sue for waste, a mortgagee must have a sufficient interest in the property. This requirement has been the chief obstacle to a waste action. At common law, the requisite interest for an action for waste was either legal title or the right to immediate possession.³⁰ More recently, varying mortgage theories have complicated ascertaining whether the mortgagee has met this requirement.

Adopting English law, many states east of the Mississippi River follow the title theory. This theory conceptualizes a mortgage as a conveyance of legal title to the mortgagee on a condition subsequent.³¹ The condition is usually the repayment of the loan. Until repayment occurs, the mortgagee retains defeasible legal title to the property, while the mortgagor usually enjoys possession. If the mortgagor defaults, there is a breach of the condi-

25. *First Fed. Sav. & Loan Ass'n v. Moulds*, 202 Kan. 557, 562, 451 P.2d 215, 220 (1969); *Folden v. Folden*, 26 Ohio Op. 2d 240, 244, 188 N.E.2d 193, 195 (App. 1962).

26. *Adkison v. Hannah*, 475 S.W.2d 39, 41 (Mo. 1972) (removal of timber enhanced value of farm; no action for waste allowed). *See also* *Proffitt v. Henderson*, 29 Mo. 325 (1860); *Deltenre v. Deltenre*, 152 Mo. App. 487, 133 S.W. 632 (K.C. 1905); *Thompson v. Thompson*, 206 Tenn. 202, 332 S.W.2d 221 (1960).

27. *See Mortgages—Mortgagees' Remedy For Damages to or Injury to the Res*, 10 TEX. L. REV. 475, 476 (1932).

28. *Id.* *See also* *Hill v. Ground*, 114 Mo. App. 80, 85, 89 S.W. 343, 345 (K.C. 1905); G. OSBORNE, G. NELSON & D. WHITMAN, REAL ESTATE FINANCE LAW § 4.4, at 123 (1979).

29. *Searle v. Sawyer*, 127 Mass. 491, 493 (1879). *Contra*, *Davis v. Clark*, 40 Mo. App. 515, 521 (K.C. 1890).

30. *See generally* *Northwestern Nat'l Bank & Trust Co. v. Pirich*, 215 Minn. 313, 317, 9 N.W.2d 773, 776 (1943); 93 C.J.S. *Waste* § 12, at 568 (1956).

31. *Leipziger*, *supra* note 3, at 1089.

tion, and title vests automatically in the mortgagee.³² Thus, the title theory gives the mortgagee legal title to the property, which in turn permits him to sue for waste after waste occurs.³³

Several states have adopted the intermediate theory. In these states, the mortgagee has a lien interest in the mortgaged property prior to default. During this time, the mortgagee's right to sue for waste is, therefore, like that of a mortgagee in a lien theory state.³⁴ When default occurs, however, the legal title and right to immediate possession vests in the mortgagee.³⁵ The mortgagee then can sue for waste as if he were a title theory mortgagee.³⁶

A number of states have chosen not to adopt either the title or the intermediate theory.³⁷ These states, primarily states west of the Mississippi River, instead developed the lien theory.³⁸ Under this theory, the mortgagee's only interest in the encumbered property is that of a lienholder; he has only a

32. See generally *Benton Land Co. v. Zeitter*, 182 Mo. 251, 267, 81 S.W. 193, 201 (En Banc 1904); *Wakefield v. Dinger*, 234 Mo. App. 407, 414, 135 S.W.2d 17, 21 (Spr. 1939). These two Missouri cases contain thorough discussions of the title theory and its effect on the property's title and the parties to a mortgage.

33. *Dutro v. Kennedy*, 9 Mont. 101, 107, 22 P. 763, 767 (1889). See generally *Wakefield v. Dinger*, 234 Mo. App. 407, 414, 135 S.W.2d 17, 21 (Spr. 1939).

34. See notes 39-44 and accompanying text *infra*.

35. *Bradfield v. Hale*, 67 Ohio St. 316, 324, 65 N.E. 1008, 1013 (1902). In *Pine Lawn Bank & Trust v. M. H. & H., Inc.*, 607 S.W.2d 696, 700 (Mo. App., E.D. 1980), the court intimated that Missouri uses the intermediate theory. The court, however, never used the language "intermediate theory" nor is this theory necessary to support the holding reached by the court. It is doubtful, therefore, that this decision will provide precedent for Missouri's adoption of the intermediate theory. *But see* Comment, *Real Estate Mortgage Theory in Missouri*, 6 MO. L. REV. 200, 204-06 (1941). In that Comment, the writer stated that the Missouri cases suggested that Missouri is an intermediate theory state with respect to straight mortgages. *Id.* at 204. While these cases may suggest that Missouri is an intermediate theory state for actions such as ejectment and trespass, Missouri case law more clearly suggests that this is not the case when the issue is a question of waste. See cases cited notes 39, 40 & 44 *infra*. These decisions concerning waste actions seem to proceed on the postulate that Missouri is a lien theory state.

36. See notes 31-33 and accompanying text *supra*. If Missouri has adopted the intermediate theory, then the problem that exists at all times in a lien theory state of finding a sufficient estate or interest in a mortgagee would be raised in Missouri only prior to the mortgagor's default. See notes 41-44 and accompanying text *infra*. Thus, the discussion of the lien theory mortgagee's problem of showing the requisite estate or interest is equally applicable to a predefault intermediate theory state mortgagee.

37. See, e.g., *Benton Land Co. v. Zeitter*, 182 Mo. 251, 267, 81 S.W. 193, 201 (En Banc 1904). See also *Leipziger*, *supra* note 3, at 1090.

38. For a discussion of and citations of states adopting the lien theory, see *Kulp v. Trustees of Iowa College*, 217 Iowa 310, 313, 251 N.W. 703, 705 (1933). See also *Denton, Right of a Mortgagee To Recover Damages From A Third Party For Injury To Mortgaged Property In Ohio*, 3 OHIO ST. L.J. 161, 161 (1937).

much interest as is required to protect his security interest.³⁹ Until the mortgagor defaults and the mortgagee forecloses or takes possession, the mortgagor holds legal title to the property. The mortgagor can sell, lease, and dispose of the mortgaged property as he sees fit.⁴⁰

Adoption of the lien theory in Missouri complicated the law of waste. A common law action for waste requires the mortgagee to have legal title or the right to immediate possession of the land. The mortgagee in a lien theory state, however, does not have these interests; the mortgagor has them instead.⁴¹ To permit an action for waste, however, one lien theory court held that the mortgagee has an interest in preventing the mortgagor from injuring the property.⁴² This conclusion is unsound because a lien theory mortgagee does not have a protectible interest in preserving the value of the mortgaged property.⁴³ Missouri and several lien theory states make it clear that a mortgagee does not have an interest in the land, but rather an interest in the prevention of any "impairment of the security of his loan."⁴⁴

The mortgagee's interest in the mortgaged property is terminable. Authorities agree that when the mortgage debt is discharged, the right of action for impairment of the security is extinguished.⁴⁵ Missouri courts theorize that the mortgagee's interest in the property and his right to sue for waste is incidental to the right to protect the security.⁴⁶ One Missouri court, however, has declared that it

39. For Missouri cases supporting this theory, see *Park Nat'l Bank v. Travelers Indem. Co.*, 90 F. Supp. 275, 277 (W.D. Mo. 1950); *Eurengy v. Equitable Realty Corp.*, 341 Mo. 341, 346, 107 S.W.2d 68, 71 (1937); *Missouri Real Estate & Loan Co. v. Gibson*, 282 Mo. 75, 78, 220 S.W. 675, 676 (1920); *Craig v. Kansas City Terminal Ry.*, 271 Mo. 516, 522, 197 S.W.141, 142 (1917).

40. *Kennett v. Plummer*, 28 Mo. 142, 145 (1859).

41. See notes 39 & 40 and accompanying text *supra*.

42. *New York Life Ins. Co. v. Clay County*, 221 Iowa 966, 969, 267 N.W. 79, 80 (1936) (action by mortgagee for damage to property by licensee of mortgagor).

43. See generally *Robinson v. Russell*, 24 Cal. 467, 473 (1864); *Allison v. McCune*, 15 Ohio 726, 732 (1846).

44. See, e.g., *Edelman v. Poe*, 267 Ala. 387, 389, 103 So. 2d 333, 335 (1958); *Bates v. Humboldt County*, 224 Iowa 841, 843, 277 N.W. 715, 716 (1938); *Kernerly v. Burgess*, 38 Mo. 440, 444 (1866); *Randolph v. Simpson*, 500 S.W.2d 289, 292 (Mo. App., K.C. 1973); *Terry v. C. B. Contracting Co.*, 388 S.W.2d 349, 351 (Mo. App., Spr. 1965); *Van Pelt v. McGraw*, 4 N.Y. 110, ____ (1850); 59 C.J.S. *Mortgages* § 338, at 465 (1949); *Mortgages—Waste—Liability of Mortgagor or His Grantee To Mortgagee For Impairment of Mortgage Security*, 27 MINN. L. REV. 407, 408 (1943).

45. *Kulp v. Trustees of Iowa College*, 217 Iowa 310, 314, 251 N.W. 703, 705 (1933); *Randolph v. Simpson*, 500 S.W.2d 289, 291 (Mo. App., K.C. 1973); *Grace v. Gill*, 136 Mo. App. 186, 191, 116 S.W. 442, 444 (K.C. 1909); 59 C.J.S. *Mortgages* § 439, at 676 (1949).

46. *Heitkamp v. LaMotte Granite Co.*, 59 Mo. App. 244, 250 (St. L. 1894) (mortgagee permitted to maintain suit for damages due to waste after foreclosure

[does] not wish to be understood as holding . . . that there *never could be* a situation where because of the peculiar circumstances the mortgagee might be forced to make some deal with the owner-mortgagor by way of compromise or extinguishment of the debt, in order to acquire title or possession so as to protect the interest secured . . . and still thereafter bring and maintain . . . [an action for waste].⁴⁷

Thus, perhaps a mortgagee could sue for impairment of the security, even following discharge of the debt.

III. REMEDIES FOR WASTE

Once a mortgagee in Missouri has established the three essential elements for a cause of action for waste, three principal remedies are available: money damages, injunction, and foreclosure.

A. Money Damages

1. Tort Theory

An action for damages developed in England as early as the twelfth century. The mortgagee then had little difficulty recovering damages for waste because he held legal title to the property.⁴⁸ Lien theory states, such as Missouri, found it more difficult to provide a theoretical basis for a tort damages action for waste. A mortgagee's nonpossessory interest in preserving the value of the property securing the debt is not the traditional legal basis for this action for damages.⁴⁹ Courts, however, did permit the mortgagee to sue in tort for waste by characterizing the mortgagor's conduct as a tort in the nature of waste.⁵⁰ Other courts allowed this action on the ground that the mortgagor had an implied duty not to impair the security.⁵¹ These courts

and sale because deficiency established). *See also* Chouteau v. Boughton, 100 Mo. 406, 13 S.W. 877 (1890).

47. Terry v. C. B. Contracting Co., 388 S.W.2d 349, 351 (Mo. App., Spr. 1965). The mortgagee in this case took title to the property in full satisfaction and discharge of the debt. There was no indication this was done merely to lessen the damages or expenses or to protect the security.

48. *See* notes 30-33 and accompanying text *supra*. Indeed, even Missouri retains vestiges of the English or title theory influence in the form of statutes providing for treble damages for waste committed by anyone during a tenant for life or years' term. *See* MO. REV. STAT. §§ 537.420-.520 (1978). *See also* Coale v. Hannibal & St. J.R.R., 60 Mo. 227, 233 (1875); First Nat'l Realty & Loan Co. v. Mason, 185 Mo. App. 37, 39, 171 S.W. 971, 972 (K.C. 1914).

49. *See* note 30 and accompanying text *supra*. *See also* *Mortgages—Deeds of Trust—Creditor's Action For Damage To The Security*, 17 N.C. L. REV. 291, 293 (1939).

50. *See* 17 N.C. L. REV., *supra* note 49, at 293. *See also* Delano v. Smith, 206 Mass. 365, 92 N.E. 500 (1910); Langdon v. Paul, 22 Vt. 205 (1850); G. OSBORNE, G. NELSON & D. WHITMAN, *supra* note 28, § 4.4.

51. *E.g.*, Page v. Lyle H. Hall, Inc., 125 Vt. 275, 280, 214 A.2d 459, 462 (1965) (mortgagor's licensee had duty not to cut and remove timber from mortgaged

then allowed suit for intentional or fraudulent acts injuring the property and impairing the security of the mortgage.⁵² Better-reasoned opinions also suggest that it is logical and practical to permit a tort action for damages for permissive waste to the extent the physical injury resulting from such waste diminishes the value of the security.⁵³ Thus, the weight of authority holds that this implied duty supports a tort action for damages for either voluntary or permissive waste.⁵⁴

Missouri and a minority of lien theory states do not allow a mortgagee this tort action for permissive waste.⁵⁵ These states hold that as long as the mortgagor refrains from acts that impair the security, he is not required to maintain the value of the security, absent specific covenants in the mortgage so stating.⁵⁶ This holding fails to recognize that a mortgagor's failure to maintain the property often results not only in normal wear and tear, but also in a pronounced dilapidation of the security. Denying the mortgagee an action for damages for permissive waste when the results of this waste are equally as destructive as voluntary waste is unfair to the mortgagee who contracted to rely on this property as security for his loan.

2. Contract Theory

In addition to a tort theory for damages, a mortgagee may recover damages for waste under a contract theory. Typically, covenants against waste are included in the mortgagee's security agreement. These covenants

property). *Accord*, Proffitt v. Henderson, 29 Mo. 325, 327 (1860); Kennett v. Plummer, 28 Mo. 142, 146 (1859). *See also* Finley v. Chain, 374 N.E.2d 67, 77 (Ind. App. 1978) (overruled on other grounds in Morris v. Weigle, 383 N.E.2d 341, 345 n.3 (Ind. 1978)); Kimberlin v. Hicks, 150 Kan. 449, 455, 94 P.2d 335, 339-40 (1939); Gardner v. W. M. Prindle & Co., 185 Minn. 147, 151, 240 N.W. 351, 353 (1932); 59 C.J.S. *Mortgages* § 334, at 459 (1949). This implied duty not to impair the adequacy of the security exists concurrently with the mortgagor's right to exercise all acts of ownership, even to the commission of acts that might constitute waste, provided he does not render the debt secured by the mortgage unsafe. *See* notes 27-29 and accompanying text *supra*.

52. *E.g.*, Hubinger v. Central Trust Co., 94 F. 788, 790 (8th Cir. 1889) (removal and sale of valuable fixtures from security).

53. *E.g.*, Finley v. Chain, 374 N.E.2d 67, 79 (Ind. App. 1978) (overruled on other grounds in Morris v. Weigle, 383 N.E.2d 341, 345 n.3 (Ind. 1978)) (waste committed by failing to keep property repaired when result was rendering portion of debt unsafe).

54. *See* 59 C.J.S. *Mortgages* § 334, at 459-60 (1949).

55. *See* Logan v. Wabash W. Ry., 43 Mo. App. 71, 75-76 (St. L. 1890) (dictum); Leipziger, *supra* note 3, at 1104.

56. *E.g.*, Syracuse Sav. Bank v. Onondaga Silk Co., 171 Misc. 993, 995, 14 N.Y.S.2d 356, 358 (Sup. Ct. 1939) (mortgagee permitted to sue mortgagor's grantee for waste because grantee had assumed mortgage with covenants requiring maintenance of property). *See also* Camden Trust Co. v. Handle, 132 N.J. Eq. 97, 102, 26 A.2d 865, 869 (1942).

are used in lien theory states for several reasons. First, covenants are used to create remedies that title theory states would give to mortgagees by virtue of their legal title or right to immediate possession.⁵⁷ Second, covenants are used to expand the damages action to include permissive waste as well as voluntary waste.⁵⁸ Third, covenants are used either to avoid or to mitigate the consequences of the substantial impairment rule⁵⁹ of most lien theory states.

One covenant typically used by mortgagees is the financial covenant. This covenant requires the mortgagor to pay all or part of the taxes or insurance premiums or to service senior encumbrances.⁶⁰ From the mortgagee's point of view, these financial covenants should be enforced because there is little difference between an act that results in physical damage to the property and any other act of neglect that threatens the value of the collateral or the priority of the mortgage.

Missouri and many states, however, do not allow a mortgagee to maintain an action for damages for waste merely because of a breach of a financial covenant.⁶¹ Not only is the breach a form of permissive waste, for which Missouri denies any damages recovery,⁶² courts support their denial of an action on the ground that with financial waste, there is no resulting physical damage to the mortgaged property.⁶³ Thus, a mortgagee's only reliable remedy for financial waste in Missouri is to advance the funds needed to pay the taxes, service the encumbrances, or pay other charges necessary to protect the security, and then to seek recovery of these advances, either by a suit for the entire debt or by foreclosure.⁶⁴ A mortgagee might seek these seemingly drastic remedies because courts hold that any sums advanced to protect the security are secured only by the mortgaged property, must be enforced as part of the mortgage debt, and cannot form the basis of an in-

57. See notes 31-33 and accompanying text *supra*.

58. See notes 55 & 56 and accompanying text *supra*. This would be true only in that minority of states, including Missouri, where the mortgagee cannot sue for permissive waste.

59. See Part IV. *infra*.

60. See Leipziger, *supra* note 3, at 1102.

61. *Horrigan v. Wellmuth*, 77 Mo. 542, 545 (1883) (mortgagee denied recovery for property taxes on mortgaged property he paid); *Camden Trust Co. v. Handle*, 132 N.J. Eq. 97, 109, 26 A.2d 865, 872 (1942) (failure of mortgagor to discharge his pecuniary obligation to pay property taxes not actionable). See also G. OSBORNE, G. NELSON & D. WHITMAN, *supra* note 28, § 4.11.

62. See notes 55 & 56 and accompanying text *supra*.

63. *Camden Trust Co. v. Handle*, 132 N.J. Eq. 97, 109, 26 A.2d 865, 872 (1942); *Ganbaum v. Rockwood Realty Corp.*, 62 Misc. 2d 391, 396, 308 N.Y.S.2d 436, 441 (Sup. Ct. 1970).

64. Cf. *Lunsford v. Davis*, 300 Mo. 508, 529-30, 254 S.W. 878, 884 (1923) (with proper covenants, mortgagee can foreclose if mortgagor fails to pay taxes).

dependent action against the mortgagor.⁶⁵ Advancing such funds is a less than adequate remedy for a mortgagee because after the advance he is protected against further waste or default by security, the value of which may be less than the new balance of the debt owed him.

Another contract provision mortgagees use to protect their security or to recover damages is a repair covenant. Typically, these covenants require a mortgagor to make repairs necessary to maintain the property in a condition similar to that existing when the mortgage was executed.⁶⁶ These covenants may expressly require that the mortgagor not commit or permit waste on the property.⁶⁷ Either way, a breach of a repair covenant usually results in permissive waste because no intentional or voluntary act against the security has occurred.

For several reasons, the breach of a repair covenant usually is not enforced in a damages action for waste. The breach results in permissive waste, and some states, therefore, will not enforce the covenant as a matter of law.⁶⁸ Other courts hold that when a mortgagor demolishes part or all of the existing improvements, he has not committed waste if the net value of the property after completion of the new improvements is equal to the value prior to the demolition.⁶⁹ These courts justify this result on the ground that the mortgagee has suffered no damages and that equity will not permit strict enforcement of the covenant under such circumstances.⁷⁰ Finally, judicial enforcement of such covenants is difficult because the court must decide if the mortgagor should have incurred the expenses of repairs. Courts would have to assess on a case-by-case basis the wisdom of the mortgagor's judgment in deciding whether and to what extent repairs should have been made.⁷¹ Reluctant to make these assessments, courts generally leave such decisions to the discretion of the mortgagor, unless the security is substantially impaired.⁷²

65. *E.g.*, *Northwestern Mut. Life Ins. Co. v. Kaufman*, 33 S.W.2d 1014, 1016 (Mo. App., St. L. 1931) (mortgagee denied recovery for delinquent taxes he paid on mortgaged property because he was not enforcing entire debt). *See also* *Bingham v. Zeno*, 228 Ark. 1039, 1042, 312 S.W.2d 181, 183 (1958); *Stallings v. Erwin*, 148 Mont. 227, 233, 419 P.2d 480, 483 (1966); *Law v. Dewoskin*, 223 Tenn. 453, 459, 447 S.W.2d 361, 363 (1969).

66. *Leipziger*, *supra* note 3, at 1105.

67. *Id.*

68. *See* notes 55 & 56 and accompanying text *supra*.

69. *E.g.*, *Heller v. Gerry*, 47 A.D.2d 697, 699, 364 N.Y.S.2d 615, 617 (1975) (disposals of fixtures during renovation of mortgaged property).

70. *See* G. OSBORNE, G. NELSON & D. WHITMAN, *supra* note 28, § 4.11, at 138.

71. *See* *Leipziger*, *supra* note 3, at 1111.

72. *E.g.*, *Erickson v. Rocco*, 433 S.W.2d 746, 751 (Tex. Civ. App. 1968). In *Erickson*, the decision of how and to what extent the mitigation of vandalism on the mortgaged property would be accomplished was left entirely to the mortgagor.

It is not entirely fair to the mortgagee for courts to refuse enforcement of repair covenants. It is reasonable to assume that the parties intended that the prohibition on demolition would give control over, or at least notice of, development of the property to the mortgagee. If the mortgagee does not approve of the demolition, the mortgagee risks noncompletion of the construction that is supposed to follow the demolition. Even if completed, the building may not provide as much security as the original structure.⁷³ Furthermore, the mortgagee and mortgagor had bargained for the mortgagee's ability to have an effective recourse against the collateral, regardless of the personal financial strength of the mortgagor. By not enforcing a repair covenant when deterioration beyond normal wear and tear occurs, this recourse, which is the chief purpose of the mortgage, is impaired substantially.

Practically, however, the unfairness to the mortgagee is not as great as it may appear. Typically, the mortgagor is in default when the mortgagee notices any pronounced deterioration or waste of the security. The mortgagee, therefore, could foreclose. Also, the mortgagee is not without recourse, even if the mortgagor keeps up his payments and does not lapse into default. In this situation, the mortgagee could seek an injunction against further waste by the mortgagor.

B. Injunction

The equitable action of injunction poses fewer problems in Missouri for a mortgagee than the action for damages.⁷⁴ It is thoroughly settled that under the proper circumstances a mortgagee without legal title or the right to immediate possession of the property may enjoin conduct of a mortgagor in possession that is injuring the mortgaged property.⁷⁵ Although there is support to the contrary,⁷⁶ the better-reasoned approach allows this action, regardless of the mortgagor's solvency.⁷⁷ A mortgagee can sue before the

The mortgagor's decision, which allowed for some continued vandalism, was construed by the court as not a breach of his covenant to keep the property in repair. *Id.* See also *Camden Trust Co. v. Handle*, 132 N.J. Eq. 97, 102, 26 A.2d 865, 869 (1942).

73. See *Leipziger*, *supra* note 3, at 1112.

74. See 2 G. GLENN, *MORTGAGES, DEEDS OF TRUST, AND OTHER SECURITY DEVICES AS TO LAND* § 195, at 1005 (1943).

75. See, e.g., *Taylor v. Adams*, 93 Mo. App. 277, 280 (K.C. 1902) (equitable interest in property will support action to enjoin conduct that is injuring property). See also *Cornelison v. Kornbluth*, 15 Cal. 3d 590, 598, 542 P.2d 981, 986, 125 Cal. Rptr. 557, 562 (1975).

76. See *Robinson v. Russell*, 24 Cal. 467, 474 (1864) (mortgagor must be insolvent before mortgagee can obtain injunction against mortgagor for threatened waste).

77. See, e.g., *Terry v. C. B. Contracting Co.*, 388 S.W.2d 349, 351 (Mo. App., Spr. 1965); *City of Toledo v. Brown*, 130 Ohio St. 513, 518, 200 N.E. 750, 752 (1936); *Core v. Bell*, 20 W. Va. 169, 172 (1882).

mortgage debt is due,⁷⁸ after default,⁷⁹ or during any redemption period.⁸⁰ Still, the action is not available as an absolute right. The mortgagee must show that he has no adequate remedy at law and that his security will be materially impaired by the threatened waste.⁸¹

The significance and use of this remedy has diminished over the years for several reasons. First, a mortgagee rarely learns of a mortgagor's destructive treatment of the property before actual waste occurs. Mortgagees rely on after-the-fact remedies. Second, when a mortgagor's conduct requires judicial intervention rather than an agreement between the parties for the cessation of such conduct, the mortgagee reasonably cannot be expected to be satisfied with a remedy that leaves the mortgagor in possession of the land and with legal title to it. Third, there has been widespread acceptance and use of a remedy that ends the debtor-creditor relationship and is quicker and cheaper than an equitable proceeding.⁸²

C. Foreclosure

A mortgagee in Missouri may seek to foreclose the mortgage when the mortgagor commits waste on the mortgaged property. This action is the most prominent remedy used today.⁸³ Foreclosure terminates the mortgagor's equity of tardy redemption⁸⁴ and is available if the mortgage contains an acceleration clause. If the mortgagor commits waste, a condition in the mortgage is broken and the debt is accelerated. If the mortgagor cannot pay the whole amount of the mortgage debt, the mortgagee may, in all states, seek

78. *Delano v. Smith*, 206 Mass. 365, 370, 92 N.E. 500, 504 (1910); *Kalbach v. Mathis*, 104 Mo. App. 300, 305, 78 S.W. 684, 685 (St. L. 1904); *Cahn v. Hewsey*, 8 Misc. 384, 385, 29 N.Y.S. 1107, 1108 (Sup. Ct. 1894).

79. *Long v. Burnside*, 295 Ill. App. 82, 88, 14 N.E.2d 660, 663 (1938); *Kalbach v. Mathis*, 104 Mo. App. 300, 305, 78 S.W. 684, 685 (St. L. 1904); *Federal Land Bank v. Jones*, 211 N.C. 317, 318, 190 S.E. 479, 480 (1937).

80. *Kulp v. Trustees of Iowa College*, 217 Iowa 310, 313, 251 N.W. 703, 705 (1933).

81. *Vybrial v. Schildhauer*, 130 Neb. 433, 438, 265 N.W. 241, 244 (1936). The mortgagee can show no adequate remedy at law because taking possession of the mortgaged premises by the mortgagee is a remedy of last resort. This is true because the action imposes severe accounting rules on the mortgagee in possession. See generally 2 G. GLENN, *supra* note 74, § 211; G. OSBORNE, G. NELSON & D. WHITMAN, *supra* note 28, § 4.10.

82. See *Leipziger*, *supra* note 3, at 1090.

83. See G. OSBORNE, G. NELSON & D. WHITMAN, *supra* note 28, § 7.11, at 446.

84. See *Henchman*, *supra* note 4, at 27. The mortgagor's equity of tardy redemption is his right after default to perform his obligation under the mortgage and have the title to his property restored to him free and clear of the mortgage. To do this, the mortgagor must pay the whole amount of the mortgage debt, interest, and other charges now secured by the mortgage due and owing.

a judicial foreclosure.⁸⁵ This type of foreclosure is, however, very cumbersome because of extensive court participation.

In addition to judicial foreclosure, Missouri statutes permit less cumbersome procedures for mortgagees to foreclose when waste occurs. The parties to a security interest in land may give a power of sale to the mortgagee when a mortgage is used⁸⁶ or to the trustee when a deed of trust is used.⁸⁷ As was the case with judicial foreclosure, following the mortgagor's commission of waste, a condition would be broken and an acceleration clause would make the total amount of the outstanding debt due.⁸⁸ When this occurs, the mortgagee or trustee with the power of sale could start foreclosure proceedings.⁸⁹ These proceedings are similar to a judicial foreclosure because there is a sale conducted; they differ because the mortgagee or the trustee conducts the sale and the sale is not judicially supervised.⁹⁰ In either a power of sale foreclosure or the judicial foreclosure, the proceeds from the sale are applied to the outstanding debt.⁹¹ If any deficiency remains, the mortgagee may sue for this deficiency, basing his action on either the debt or on any actionable waste.⁹² Under either of these foreclosure procedures, the mortgagor loses the property.⁹³ The threat of a foreclosure, therefore, is probably the mortgagee's most potent weapon against waste.

85. Judicial foreclosure is the best method of determining conclusively the rights of all interested parties and, consequently, of producing the most marketable title. This method is, however, the most complicated, costly, and time-consuming foreclosure method because the court must be involved in and approve of all aspects of the foreclosure. *See* G. OSBORNE, G. NELSON & D. WHITMAN, *supra* note 28, § 7.11, at 447; Nelson, *Constitutional Problems with Power of Sale Real Estate Foreclosure: A Judicial Dilemma*, 43 MO. L. REV. 25, 25 (1978).

86. *See* MO. REV. STAT. § 443.290 (1978). This statute only covers giving the mortgagee a power of sale in the mortgage he is holding. It is settled law in Missouri that a mortgagee under a straight mortgage with a power of sale, however, cannot purchase at his own sale, either directly or indirectly, so as to cut off the equity of tardy redemption. *Giraldin v. Howard*, 103 Mo. 40, 46, 15 S.W. 383, 387 (1891). For this reason, this statute is rarely used today in Missouri.

87. *See* MO. REV. STAT. § 443.410 (1978). This statute allows the beneficiary under a deed of trust to purchase at the foreclosure sale.

88. *See* notes 3-5 and accompanying text *supra*.

89. *State ex rel. Leverage Inv. Enterprises, Ltd. v. Yeaman*, 581 S.W.2d 53, 57 (Mo. App., W.D. 1979).

90. For a more exhaustive discussion on the particulars of a power of sale foreclosure, *see generally* Muller, *Deed of Trust Foreclosure: The Need For Reform*, 29 J. MO. B. 222 (1973); Nelson, *supra* note 85.

91. *McCune's Estate v. Daniel*, 76 S.W.2d 403, 408 (Mo. 1934). *See also* *Randolph v. Simpson*, 500 S.W.2d 289, 292 (Mo. App., K.C. 1973); 59 C.J.S. *Mortgages* § 334, at 461 (1949).

92. *See* note 6 and accompanying text *supra*.

93. The mortgagor still may have statutory redemption rights, which, if exercised in a timely fashion, would enable him to retain the property. *See* MO. REV.

D. *Timing an Action for Damages and Foreclosure*

Often a mortgagee may be able to foreclose and to obtain damages. Both actions are available when the waste not only damages the value of the security but also breaches a covenant in the mortgage, accelerates the debt, and facilitates foreclosure. A mortgagee with both actions available to him must decide which to bring first. He may bring an action for the damages caused by the waste prior to foreclosing. Alternatively, he may foreclose, and if the foreclosure sale results in a deficiency, he may pursue a claim against the mortgagor for the damages caused by the waste.

Suing first for damages may be advantageous. The action for damages will give the mortgagee an appraisal of the damage to the property resulting from the waste. This determination will aid the mortgagee in bidding in a subsequent foreclosure sale. Additionally, and of indirect benefit to the mortgagee, the risk of uncertain or faulty valuation of the damages falls on the mortgagor. For example, if the property appraisal in the waste action overestimates the amount of damages, the mortgagee who recovers a judgment for these inflated damages and thereafter forecloses will bid less because the damage award reduces the mortgage debt due.⁹⁴ If the mortgagee is the successful bidder at the foreclosure sale, as he usually is, he may recover more than his outstanding loan when he thereafter resells the property, which by definition is worth more than his bid due to the inflated damage award.⁹⁵

A mortgagee may not always prefer to recover damages for the waste prior to foreclosure. As suggested above, the threat of foreclosure is probably the mortgagee's most effective deterrent against potential waste because the possibility of losing the property concerns the mortgagor more than the possibility of paying damages. Additionally, Missouri applies the substantial impairment rule,⁹⁶ which requires the court to make a difficult determination of the amount of the waste necessary to support the damages action. A mortgagee subject to this rule has a difficult time recovering damages and, therefore, often resorts to foreclosure. Finally, the recovery of damages

STAT. §§ 443.410-.440 (1978); Comment, *Statutory Redemption Following Power of Sale Foreclosure in Missouri*, 47 MO. L. REV. 309 (1982).

94. The mortgagee would be required to reduce the outstanding balance of the debt by the amount of the damage award. *Kulp v. Trustees of Iowa College*, 217 Iowa 310, 314, 251 N.W. 703, 705 (1933). This reduced debt would be the mortgagee's credit bid in any subsequent foreclosure sale. A credit bid is one for which the mortgagee does not have to pay cash, but rather is credited with the loan amount outstanding.

95. See Leipziger, *supra* note 3, at 1120. The mortgagee is usually successful at a foreclosure sale because the sale process does not emulate an open market type sale of property. The statutory required notice of the sale, see MO. REV. STAT. §§ 443.310-.320 (1978), normally does not attract many bidders, and as a result, the mortgagee's credit bid is usually taken and accepted.

96. See Part IV. *infra*.

leaves the security in the possession of a less solvent, unreliable, and wrongdoing mortgagor. This may be unacceptable to the mortgagee.

Some authorities suggest that a mortgagee may be required to foreclose prior to seeking damages for waste that the mortgagor has committed.⁹⁷ These authorities reason that if the waste is not severe, the mortgagee could buy the property at the foreclosure sale for the amount of the outstanding debt and then resell the property at cost or possibly even at a profit.⁹⁸ In this situation, therefore, there would be no damages for the waste because the full amount of the debt has been discharged; the mortgagee has not been damaged.⁹⁹ Additionally, it has been suggested that requiring the mortgagee to foreclose first would result in more accurate, efficient, and effective resolutions to these waste problems.¹⁰⁰ Foreclosing first would allow the market place, instead of the court, to determine the diminution in value of the mortgaged property due to the waste.¹⁰¹ Finally, requiring foreclosure first is advantageous to the mortgagee because it prevents a prior damages action for the waste.¹⁰²

Missouri's position on the foreclosure first rule is unclear.¹⁰³ Early Missouri decisions indicated that a deficiency following foreclosure had to

97. See 5 D. AUGUSTINE & S. ZARROW, CALIFORNIA REAL ESTATE LAW & PRACTICE § 120, at 42 (1974); Leipziger, *supra* note 3, at 1119. Cf. *Logan v. Wabash W. Ry.*, 43 Mo. App. 71, 75 (St. L. 1890) (court refused to permit mortgagee who, prior to entry or foreclosure, had no title, possession, nor right to possession of land, to maintain action for injury to land). Some states may require by statute that a mortgagee foreclose first. See, e.g., CAL. CIV. CODE § 726 (West 1980), which provides that the enforcement of any right secured by a mortgage must be by an action to foreclose the mortgage. As long as the mortgage remains in existence, the California statute bars an action on the debt prior to foreclosure and arguably bars any personal recovery for waste as well. See generally *Walker v. Community Bank*, 10 Cal. 3d 729, 518 P.2d 329, 111 Cal. Rptr. 897 (1974); *Barbieri v. Ramelli*, 84 Cal. 154, 23 P. 1086 (1890).

98. This is possible because the value of the security given is usually greater than the amount of the loan. Thus, even after some waste, the property's value is often sufficient to cover the amount of the unpaid portion of the debt.

99. A credit bid by the mortgagee for the full unpaid portion of the debt would discharge the debt. Once the debt is discharged, there can be no independent action for damages due to the waste. See notes 45 & 46 and accompanying text *supra*.

100. See J. HETLAND, SECURED REAL ESTATE TRANSACTIONS § 2.11, at 53 (1974).

101. But see note 95 and accompanying text *supra*.

102. This is true, assuming the foreclosure sale does not result in a deficiency and the debt is fully discharged. This would be the case if the mortgagee made a bid greater than or equal to the amount of the unpaid portion of the debt, as is often the case.

103. See *Heitkamp v. LaMotte Granite Co.*, 59 Mo. App. 244, 250 (St. L. 1894) (court recognized that authorities do not agree on the mortgagee's ability to sue for waste prior to foreclosure).

precede a damages action for waste.¹⁰⁴ A more recent Missouri case, however, has suggested that the mortgagee's right to damages for the impairment of his security does not depend on the establishment of a deficiency after a foreclosure.¹⁰⁵ This reasoning, consistent with the modern weight of authority,¹⁰⁶ also effects the equitable proposition that in order to give the mortgagee the full benefit of his security, he should be afforded the right to pursue all remedies available to him concurrently or successively.¹⁰⁷

IV. THE SUBSTANTIAL IMPAIRMENT RULE

The availability and effectiveness of the three principal remedies for waste discussed above is limited by a rule Missouri and most lien theory states apply. This rule prevents an action for waste until the mortgagor commits waste that *substantially* impairs the value of the security.¹⁰⁸ The primary problem with this rule is determining what constitutes substantial impairment.

A. *The Debt Equivalency Test*

The standard most often applied when determining the substantiality of the waste is the debt equivalency test.¹⁰⁹ This standard is premised on allowing the mortgagee no more security than an amount equal to the mortgage debt.¹¹⁰ Following this reasoning, Missouri and a majority of lien theory states hold that a mortgagor's waste has not substantially impaired the mort-

104. *Guaranty Sav. & Loan Ass'n v. City of Springfield*, 346 Mo. 79, 85, 139 S.W.2d 955, 957 (En Banc 1940); *Chouteau v. Boughton*, 100 Mo. 406, 411, 13 S.W. 877, 880 (1890); *Girard Life Ins. Annuity & Trust Co. v. Mangold*, 83 Mo. App. 281, 284 (St.L. 1900). In all of these cases, the mortgagee sought damages for waste committed prior to foreclosing and after a deficiency had been established by a foreclosure.

105. *Terry v. C. B. Contracting Co.*, 388 S.W.2d 349, 351 (Mo. App., Spr. 1965) (dictum). This statement, however, is only dictum. In this case, the mortgagee took a warranty deed from the mortgagor and, in exchange, gave him a complete release and satisfaction for the debt. There was no foreclosure, nor was there any indication that the conveyance to the mortgagee was because of any threat of foreclosure. The mortgagee was denied an action for the impairment of his security by the mortgagor because the release he gave discharged the debt.

106. *See, e.g., Delano v. Smith*, 206 Mass. 365, 92 N.E. 500 (1910); *Taylor v. McConnell*, 53 Mich. 587, 19 N.W. 196 (1884); 2 L. JONES, A TREATISE ON THE LAW OF MORTGAGES OF REAL PROPERTY §§ 695(a) & 696 (8th ed. 1928); 59 C.J.S. *Mortgages* § 338 nn.55-58 (1949).

107. *See* note 7 and accompanying text *supra*.

108. *See generally Kircher v. Schalk*, 39 N.J.L. 335, 339 (1877); *Jones v. Costigan*, 12 Wis. 757, 762 (1860); Note, *supra* note 8, at 621 n.14.

109. *E.g., People ex rel. Dep't of Transp. v. Redwood Baseline, Ltd.*, 84 Cal. App. 3d 662, 682, 149 Cal. Rptr. 11, 24 (1978); *Chouteau v. Boughton*, 100 Mo. 406, 411, 13 S.W. 877, 880 (1890).

110. Cases cited note 109 *supra*.

gagee's security until the waste reduces the value of the encumbered property to less than the unpaid balance of the debt.¹¹¹

The soundness of the debt equivalency test often has been questioned. For example, regardless of how substantial the injury to the land may be, the mortgagee may have no action for waste if the remaining property is of a value equal to the amount of the debt still outstanding.¹¹² Thus, if the debt has been reduced over time, a mortgagee may be required to show a virtually complete destruction of the property before he could sue the mortgagor. This result contradicts a traditional principle of mortgages that a mortgagee has a right to his security unimpaired until his whole debt is paid and that he cannot be deprived of any substantial part of his security without full redress thereof, even though, in its damaged condition, the property is still of sufficient value to satisfy the mortgage debt.¹¹³

In fact, the mortgagee can be damaged by adhering to the debt equivalency test. This is true even though the value of the mortgaged estate after the injury remains equal to or exceeds the amount of the encumbrance. The interest rate of the mortgage has been determined by the value of the property securing the debt.¹¹⁴ Waste, however, causes a mortgagee who has loaned money at a low rate of interest because of ample security to sustain a risk that is disproportionate to the interest rate charged.¹¹⁵ Also, it will be difficult for the mortgagee to transfer the mortgage or debt without discounting substantially because of the low interest rate that it bears in relation to the remaining security.¹¹⁶

B. *The Margin of Security Test*

The debt equivalency test may be appropriate only when the mortgage has been or will be immediately foreclosed and the debtor-creditor relationship ends. The mortgagee then is protected if, at the time of foreclosure, the value of the property at least equals the debt. On the other hand, if the debtor-creditor relationship continues after recovery of damages for past waste or an injunction against further waste, application of this test would conflict with the parties' expectations.¹¹⁷ Mortgagees almost always lend less than the value of the property securing the loan. The mortgagee, therefore, expects a margin of security over the amount of the debt. One court even

111. See, e.g., *Cornelison v. Kornbluth*, 15 Cal. 3d 590, 598, 542 P.2d 981, 986, 125 Cal. Rptr. 557, 562 (1975); *Terry v. C. B. Contracting Co.*, 388 S.W.2d 349, 351 (Mo. App., Spr. 1965).

112. See 10 TEX. L. REV., *supra* note 27, at 477.

113. See *Denton*, *supra* note 38, at 167.

114. See G. OSBORNE, G. NELSON & D. WHITMAN, *supra* note 28, § 4.4, at 125.

115. See 10 TEX. L. REV., *supra* note 27, at 478. The rate of interest will vary as does the value of the mortgaged premises in comparison with the debt. Usually, the greater the security in proportion to the debt, the lower the interest rate will be.

116. See *id.*

117. See *id.*

recognized that both the mortgagee and the mortgagor generally expect the margin of security to increase when the debt is repaid in installments of principal and interest.¹¹⁸ In fact, the mortgagee would not have made the loan absent a difference between the amount lent and the value of the property and, therefore, this cushion is part of the security.¹¹⁹ Thus, the debt equivalency test fails to protect this cushion when a mortgagee is denied a remedy merely because only insubstantial waste has occurred.

The margin of security test¹²⁰ has been suggested in lieu of the debt equivalency test when the debtor-creditor relationship continues after the waste action and the property remains in the mortgagor's possession. Under this test, the mortgagee would be as secure after the injury to the land as he was before it. When the mortgagor committed waste, the resulting debt-to-security ratio would be examined. If the new ratio were greater than or equal to the original ratio when the mortgage was executed, the mortgagee could not sue for waste. If the new ratio were less than the original ratio, the mortgagee could recover from the mortgagor an amount to be applied on the mortgage debt as would make the debt after this application bear the same ratio to the mortgaged estate after the injury as the original debt bore to the mortgaged property before the injury.¹²¹ This test would not affect the mortgagor adversely.¹²² He would be permitted to retain possession and ownership of the mortgaged property. Furthermore, the mortgagee would be in a much fairer and more secure position. By permitting the mortgagee to regain his original debt-to-security ratio, this test fulfills the bargained for and reasonable expectations of the parties.

Not all courts use the original mortgage debt-to-security ratio to decide the availability of an action for waste under the margin of security test. Some courts have held that an action for waste exists only if the value of the collateral no longer affords the mortgagee a reasonable margin above the

118. *People ex rel. Dep't of Transp. v. Redwood Baseline, Ltd.*, 84 Cal. App. 3d 662, 683, 149 Cal. Rptr. 11, 25 (1978) (court allowed mortgagee to retain condemnation award funds because mortgagee entitled to higher, precondemnation security ratio).

119. See Note, *supra* note 8, at 621 n.14.

120. See generally 10 TEX. L. REV., *supra* note 27, at 482.

121. See *id.* For example, *E* loaned \$5,000 to *R* and as security took a mortgage on *R*'s land worth \$10,000. Later, *R* injured the mortgaged property to the extent of \$5,000. Under the debt equivalency test, *E* would have no action for waste because the value of the remaining property is equal to the balance of the outstanding debt. Under the suggested test, *E* would recover \$2,500 and apply this on the debt. The debt would then be reduced to \$2,500 and would bear the same ratio to the remaining property after injury as the original debt did to the mortgaged property as it stood at the time of the execution of the mortgage.

122. This would be true notwithstanding a possible liquidity crisis that may arise anytime a monetary recovery is extracted from a person.

amount of the debt.¹²³ Older cases have held that a reasonable margin exists when the value of the property after the waste is at least one-third more than the amount of the loan.¹²⁴ Others have stated that a reasonable margin of security is that which a conservative, prudent lender would expect to have¹²⁵ or that margin which the current practices of today's lenders require.¹²⁶ Finally, one court indicated that the parties to a mortgage do not bargain for maintenance of the margin of security existing at the inception of the transaction, but rather a margin determined thereafter, immediately before the commission of the waste.¹²⁷

Not all of the margin of security tests described above are fair to the mortgagor. For example, the prewaste margin of security test probably overprotects the mortgagee. Due to the widespread use of periodic installment loans, the amount of the debt unpaid just prior to the commission of waste could be very small compared to the value of the security. To allow a recovery by the mortgagee for waste simply because the postwaste debt-to-security ratio is now larger than the low prewaste ratio would be unfair to the mortgagor. The mortgagee could recover against the mortgagor based on a margin of security for which he did not bargain. This recovery would put the mortgagee in a more secure position than he could have expected when he executed the mortgage.

V. CONCLUSION

A mortgagee in Missouri theoretically can sue a mortgagor who injures the mortgaged property for waste. This action, however, does not adequately protect the mortgagee because of the manner in which the three principal remedies for waste are applied in Missouri. The mortgagee's attempts to improve his remedy of damages by using appropriate covenants have been met by a reluctance in Missouri courts to enforce them. Missouri courts also have denied relief for permissive waste, regardless of how substantial it may be. Similarly, such injunctive relief as may be granted to the mortgagee is inadequate because the mortgagee is usually unaware of the waste while it is occurring and normally relies on after-the-fact remedies. Therefore, the only remedy that a mortgagee really can rely on is a foreclosure action. This remedy, however, is available to a mortgagee only if the mortgage instrument allows foreclosure for waste.

123. See Leipziger, *supra* note 3, at 1099. This standard should be unacceptable because of its vagueness. The courts would be left to determine what margin of security would be "reasonable." This should not be necessary because the parties themselves made this determination when they executed the loan.

124. *E.g.*, King v. Smith, 67 Eng. Rep. 99, 101 (Ch. 1843).

125. Moriarty v. Ashworth, 43 Minn. 1, 2, 44 N.W. 531, 532 (1890).

126. Leipziger, *supra* note 3, at 1099.

127. *People ex rel. Dep't of Transp. v. Redwood Baseline, Ltd.*, 84 Cal. App. 3d 662, 682, 149 Cal. Rptr. 11, 24 (1978).

Moreover, the availability of any remedy for waste in Missouri is subject to an initial determination of whether the waste has substantially impaired the security. While the current standard for making this determination, the debt equivalency test, is sound for the foreclosing mortgagee, it is not sound for a mortgagee who expects the debt to continue. In this latter situation, the debt equivalency test forces the mortgagee to be exposed to new, unacceptable risks for which he neither bargained nor reasonably expected. In such a situation, Missouri should preserve the mortgagee's security and apply some form of the margin of security test for determining if the waste has substantially impaired the security.

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