Michigan Law Review

Volume 47 | Issue 2

1948

MORTGAGES--"DEPRESSION JURISPRUDENCE" --REMAINING EFFECTS IN STATUTORY LAW

John F. Buchman, III S.Ed.
University of Michigan Law School

MORTGAGES—"DEPRESSION JURISPRUDENCE"—REMAINING EFFECTS IN STATUTORY LAW—Periods of economic depression, to a far greater degree than more prosperous times, bring into sharp conflict the competing interests of debtor and creditor. This conflict becomes especially apparent in the field of mortgage law. The mortgagee-creditor wants to enforce payment of the debt according to the terms of the contract, taking advantage of the security for which he bargained. The mortgagor-debtor is anxious to protect, if possible, his own investment in the mortgaged property. Because of the vast number of cases which occurred during the 1930's in which it appeared unduly harsh and inequitable to accord mortgagees their traditional privileges and remedies, steps were taken to relieve these hardships. In some cases, the demand for relief was met directly by judicial adaptation to the unusual circumstances.[1] Broad equitable principles and powers were invoked to prevent enforcement of the mortgage in a situation which seemed unfair to the

[1] Suring State Bank v. Giese, 210 Wis. 489, 246 N.W. 556 (1933); Columbia Theological Seminary v. Arnette, 168 S.C. 272, 167 S.E. 465 (1932); Federal Title & Mortgage Guaranty Co. v. Lowenstein, 113 N.J. Eq. 200, 166 A. 538 (1933).

debtor.[2] In other states, however, the courts refused special relief for mortgagors;[3] then, frequently, state legislatures came to their aid. It is with these legislative solutions that this comment will deal, with the purpose of discovering to what extent this "depression jurisprudence" has become a permanent part of our mortgage law.

I

The first relief measures took the form of various "moratorium" types of legislation, under which foreclosure or sale of mortgaged property was forbidden or suspended.[4] These statutes raised serious questions of constitutionality, particularly under the contracts clause of the Federal Constitution and similar provisions of state constitutions.[5] Finally, however, the United States Supreme Court, in *Home Building and Loan Association v. Blaisdell*,[6] upholding the Minnesota Mortgage Moratorium Law,[7] recognized very extensive legislative powers in this regard. The moratoria statutes were generally, by their terms, temporary, emergency measures. The usual provision was for expiration at a stated date a year or two after passage, though they were frequently renewed, sometimes to as late a date as 1948. The history of the contracts clause supports the argument that economic emergencies, however serious, will not justify any impairment of contract obligations.[8] The Court, while admitting that "Emergency does not create power,"[9] thought nevertheless that the desperate financial conditions supported these relief measures as an exercise of the states' police power. Practically all of the

[2] It was usually stated in these cases that the court was merely exercising traditional equity powers, which were invoked, however, only when special circumstances so moved the court. For discussion of these judicial aspects of the development, see Warm, "A Study of Some of the Problems Concerning Foreclosure Sales and Deficiency Judgments," 6 BROOKLYN L. REV. 167 (1936); Stanley, "The Effect of Economic Depression upon Foreclosure," 27 KY. L.J. 365 (1939); "Extent of Equitable Relief in Depression Foreclosure," 33 ILL. L. REV. 299 (1938).

[3] Williams v. Jones, 165 Va. 398, 182 S.E. 280 (1935); Provident Building & Loan Association v. Pekarek, 52 Ohio App. 492, 3 N.E. (2d) 983 (1936).

[4] For an excellent discussion of this legislation, see Skilton, "Mortgage Moratoria Since 1933," 92 UNIV. PA. L. REV. 53 (1943); and for more general considerations, Stone, "Mortgage Moratoria," 11 WIS. L. REV. 203 (1936).

[5] Cases are gathered in a series of annotations, "Financial Depression as Justification of Moratorium or Other Relief to Mortgagors," 90 A.L.R. 1330 (1934); 94 A.L.R. 1352, 96 A.L.R. 853, 97 A.L.R. 1123 (1935); 104 A.L.R. 375 (1936). Other annotations on this general topic are contained in 82 A.L.R. 976 (1933); 85 A.L.R. 1480 (1933); 89 A.L.R. 1087 (1934); 108 A.L.R. 891 (1937).

[6] 290 U.S. 398, 54 S.Ct. 231 (1934).

[7] Minn. Laws (1933) c. 339.

[8] Dissenting opinion of Justice Sutherland in Home Building & Loan Association v. Blaisdell, 290 U.S. 398 at 449, 54 S.Ct. 231 (1934).

[9] Id. at 425.

moratoria laws have now expired by virtue of their own limitations.[10] Quite often, the extended moratorium was declared unconstitutional by courts which felt that the emergency had passed and that conditions no longer justified suspension of foreclosure and sale.[11]

Remnants of the moratorium legislation appear in a few states, however. The simplest is probably that of Indiana,[12] which merely requires a one-year delay after the filing of a bill for foreclosure before the decree of sale shall be carried out. This applies to every case, so long as the act remains in force. More in the spirit of the depression-moratoria are various statutes which, though permanent legislation, are only to operate in time of need. North Dakota provides that "when the amount of the debt is less than the value of the property involved, and when any judgment will have the force and effect of depriving a defendant of his home and confiscating his property, the court may construe further proceedings to be unconscionable, and may delay the signing of such order to such time as it shall deem it advisable and just to enter the same. . . ."[13] An Iowa statute provides for the continuance of the foreclosure proceedings, upon a showing that default in payment or inability to pay is due to unfavorable weather conditions (such as drought or flood), or "when the Governor of the State of Iowa by reason of a depression shall have by proclamation declared a state of emergency to exist within this state."[14] Such continuance is to be accompanied by the appointment of a receiver to take charge of the property, collect rents and income, and apply them to the payment of taxes, insurance, and principal and interest of the debt. Broadest in its coverage is the Arkansas statute, which stipulates that: "In fixing the time when a sale is to be made under a foreclosure decree, the court shall have regard to economic conditions, and shall fix a date that will insure, if possible, a fair price for the property, having due regard to the interests of both the creditor and the debtor."[15]

[10] See Skilton, "Mortgage Moratoria Since 1933," 92 UNIV. PA. L. REV. 53 at 68-72 (1943). An exception is the New York statute, N.Y. Civil Practice Act (Cahill-Parsons, 1941) § 1077a et seq., which has been reenacted regularly since 1933 and was last extended to July 1, 1948 by N.Y. Laws (1947) c. 472. The constitutionality of the 1943 extension was upheld in East New York Savings Bank v. Hahn, 326 U.S. 230, 66 S.Ct. 69 (1945).

[11] Morse v. Shangold, 135 N.J. Eq. 350, 38 A. (2d) 865 (1944); First Trust Co. of Lincoln v. Smith, 134 Neb. 84, 277 N.W. 762 (1938); First Trust Joint Stock Land Bank of Chicago v. Arp, 225 Iowa 1331, 283 N.W. 441 (1939). These decisions found support in a declaration in Home Building & Loan Association v. Blaisdell, 290 U.S. 398 at 442, 54 S.Ct. 231 (1934), that, "It is always open to judicial inquiry whether the exigency still exists upon which the continued operation of the law depends."

[12] Ind. Stat. Ann. (Burns, 1933) § 3-1801.

[13] N.D. Rev. Code (1943) § 28-2904.

[14] Iowa Code (1946), § 654.15.

[15] Ark. Dig. Stat. (Pope, 1937) § 9479.

II

The foregoing statutes deal only with the timing of the mortgagee's remedies. The relief they give the debtor is delay. Another type of depression legislation goes not to the time of the proceeding but to its mode of operation. The point of attack is the problem of securing a fair price for the property at foreclosure sale(or sale under a power contained in the mortgage), since it was this price which fixed the amount of the deficiency judgment to which the creditor would be entitled under the usual practice.[16] While it was theorized that a fair price could be insured by a fair, public sale and competitive bidding,[17] in practice this did not prove to be true. Although this problem was rendered more acute by depression conditions and the virtual absence of a market for land,[18] the relation of sale price to value is a constant feature of mortgage foreclosures and sales, and it was to be expected that in this field the new legislation would have the most lasting effect. Such has proved to be the case. The constitutional question arose again in connection with statutes regulating the sale price; and several state courts held them invalid, at least as applied to mortgages then in force, allowing at most prospective operation.[19] Then, in *Richmond Mortgage and Loan Corporation v. Wachovia Bank and Trust Co.*,[20] the Supreme Court sustained a North Carolina statute, not purporting to be merely an emergency measure, which limited the amount of the deficiency judgment which the mortgagee might recover.[21] The court rested its decision on the ground that the mortgagee is entitled by his contract only to payment in full of his debt, and a statute which merely prevents him from getting more than this does not impair contract obligations.[22]

A

The earliest stage at which the problem of fair price can be attacked is in the order for sale. Statutes have long existed which require an appraisal of the mortgaged property, out of court, by expert appraisers, and forbid sale of the property for less than two-thirds of this appraised

[16] 3 JONES, MORTGAGES, 8th ed., § 2206 (1928); 2 WILTSIE, MORTGAGE FORECLOSURE, 4th ed., §§ 949, 973 (1927).

[17] Suring State Bank v. Giese, 210 Wis. 489, 246 N.W. 556 (1933).

[18] Gelfert v. National City Bank, 313 U.S. 221, 61 S.Ct. 898 (1941); Federal Title & Mortgage Guaranty Co. v. Lowenstein, 113 N.J. Eq. 200, 166 A. 538 (1933).

[19] Langever v. Miller, 124 Tex. 80, 76 S.W. (2d) 1025 (1934); Pennsylvania Company for Insurance on Lives and Annuities v. Scott, 329 Pa. 534, 198 A. 115 (1938); Brown v. Fernon, 5 Cal. (2d) 226, 54 P. (2d) 712 (1936); Kresos v. White, 47 Ariz. 175, 54 P. (2d) 800 (1936).

[20] 300 U.S. 124, 57 S.Ct. 338 (1937).

[21] N.C. Laws (1933) c. 275; N.C. Gen. Stat. (Michie, 1943) §§ 45-32 et seq.

[22] See also Gelfert v. National City Bank, 313 U.S. 221 at 233, 61 S.Ct. 898 (1941).

value.[23] If this amount is not bid at the first attempted sale, another sale may be held in twelve months, at which the property may be sold to the highest bidder without reference to the appraised value. No state appears to have adopted this system during the 1930's. A Louisiana statute[24] supplemented it, however, with the provision that if the sale is held without such appraisal, and the proceeds are insufficient to satisfy the debt, the debt should nevertheless be fully discharged.

Two states adopted another system for pre-sale determination of the price which must be bid before the property could be struck off. The Michigan statute[25] reads, "... the court may fix and determine the minimum price at which the real property covered by such mortgage or land contract may be sold...." Under this provision, valuation is discretionary with the court. The Washington statute,[26] particularly interesting because its language was taken directly from an earlier judicial decision,[27] is worded thus: "The court, in ordering the sale, may in its discretion, take judicial notice of economic conditions, and after a proper hearing fix a minimum or upset price to which the mortgaged premises must be bid or sold before confirmation of the sale."

The next point at which the problem of obtaining a fair price has been attacked is that of confirmation of the sale. The proposition is often stated by courts that mere inadequacy of price is not sufficient ground for refusing to confirm or for setting aside a foreclosure sale.[28] Only an inadequacy so great that it "shocks the conscience" of the court, or inadequacy of price accompanied by some element of unfairness in the sale proceeding, or excusable failure on the part of the mortgagor or potential bidders to take action which would have produced a higher bid, will justify such action.[29] This rule is qualified by a few statutes passed during the depression period and still in force. For example, that of Arkansas provides, "Before confirming a sale, the court shall consider whether or not, on account of economic conditions or circumstances attending the sale, a fair price, with reference to the intrinsic value of the property, was obtained. If it is made to appear to the court that a better price could be obtained at a resale, the court shall order a resale on such terms as the court shall require."[30] The Wisconsin statute states that,

[23] Ark. Dig. Stat. (Pope, 1937) § 9464; La. Code (Dart, 1939) Art. 680; Ohio Gen. Code Ann. (Page, 1938) § 11675; N.M. Stat. Ann (1941), § 21-205.

[24] La. Gen. Stat. (Dart, 1939) § 5021.6.

[25] Mich. Stat. Ann. (1938) § 27.1134.

[26] Wash. Rev. Stat. (Remington, Supp. 1940) § 1118.

[27] Suring State Bank v. Giese, 210 Wis. 489 at 493, 246 N.W. 556 (1933).

[28] Gadreault v. Sherman, 250 Mass. 145, 145 N.E. 49 (1924); 3 JONES, MORTGAGES, 8th ed., § 2462 (1928).

[29] Magann v. Segal, (C.C.A. 6th, 1899) 92 F. 252 (1899).

[30] Ark. Dig. Stat. (1937) § 9479.

"No sale shall be confirmed and judgment for deficiency rendered, until the court is satisfied that the fair value of the premises has been credited on the mortgage debt."[31] This act, however, met a construction which rendered it merely a statement of the judicial rule previously in effect.[32] "Fair value," as used in the statute, the court said, meant only such a price as would not "shock the conscience" of the court; and mere inadequacy of price would still not justify a refusal to confirm the sale.

B

By far the most common measure, however, deals with the problem at the stage of the mortgagee's efforts to obtain a deficiency judgment. With many variations, the basic provisions are these: If the property has been sold on foreclosure for less than the amount remaining due on the mortgage debt, the mortgagor may interpose as a defense to the request for a deficiency judgment, either as part of the foreclosure proceeding or in a separate suit on the mortgage debt, the claim that the property had a real value[33] at the time of the sale equal to the amount of the debt. The parties then submit evidence concerning the value of the property. If the court (sometimes the question is to be submitted to the jury) finds that the value of the property at the time of sale was equal to or greater than the debt, the debt is to be considered extinguished, and no deficiency judgment will be given. If the value so determined is less than the amount of the debt, that value or the sale price, whichever is greater, will be credited against the debt and a deficiency judgment given only for the difference. No excess in value is ever returned to the mortgagor, however, unless actually realized upon sale. This type of statute is in force in twelve states.[34] The Arizona statute introduces a variation in that the value to be considered is that as of the time the mortgage was given, rather than as of the time of sale. North Carolina, Pennsylvania and South Dakota make this procedure operative only when the property was bid in by the mortgagee, directly or indirectly.

[31] Wis. Stat. (1947) § 278.105.

[32] Northwestern Loan & Trust Co. v. Bidinger, 226 Wis. 239, 276 N.W. 645 (1937).

[33] The statutes use various terms to define the "value" of the property to be applied for this purpose, for example, "fair market value," "true value," "true market value," "fair value," "actual value," "appraised value." Although indefinite, all of these terms indicate some amount other than the actual sale price, or some intrinsic worth not reflected in the bids.

[34] Ariz. Code Ann. (1939) § 62-517; Cal. Code of Civ. Proc. (Deering, 1941) § 580a; Idaho Code Ann. (Courtwright, Supp. 1940) § 9-110; N.J. Rev. Stat. (1937) §2:65-3; N.Y. Civil Practice Act (Cahill-Parsons, 1941) § 1083; N.C. Gen. Stat. (Michie, 1943) § 45-34; Okla. Stat. (1941) tit. 12, § 686. Pa. Stat. Ann. (Purdon, 1931) § 21-793; S.C. Code (1942) § 8712; S.D. Code (1939) § 37.3007; Wash. Rev. Stat. (Remington, 1933) § 1119; Wis. Stat. (1947) § 278.105.

North Dakota has gone even further, denying the right of the mortgagee to a deficiency judgment under all circumstances. The statute[35] declares that no action on any part of a debt secured by mortgage or land contract may be brought either before or after foreclosure (except against some party other than the mortgagor, by whose obligation the debt is also secured), and that, "It is the intent of this section that no deficiency judgment shall be rendered...."[36] Montana denies a deficiency judgment only on purchase-money mortgages given to the vendor of the land.[37] California has a like provision for purchase-money mortgages, in addition to the more common, general provision limiting deficiency judgments in terms of value.[38] North Carolina allows no deficiency judgment on a purchase-money mortgage given to the vendor of the land, or in any case of sale under a power of sale contained in the mortgage.[39]

C

Another device for insuring a fair price, coming into play after the sale, is the statutory procedure for redemption from foreclosure sale by paying to the purchaser at the sale only the amount bid by him, with interest, taxes, insurance, and other expenses incurred by him in preserving the estate. This system was in force in a large number of states long before the late depression;[40] but so far as the writer has been able to determine, no additional states adopted it during that period.

III

In the light of the unsatisfactory depression experience with foreclosure sales, it was suggested that strict foreclosure, generally abandoned because it was considered unfair to the mortgagor, might prove to be more nearly just after all.[41] However, this writer found no instance of a return to strict foreclosure, although the statutes which deny any deficiency judgment in certain cases approach that system.

The statutes display a few attempts to afford limited relief to the mortgagor without attacking the basic problems involved. Thus, a

[35] N.D. Rev. Code (1943) §§ 32-1906, 32-1907.

[36] The provision is made applicable only to mortgages executed after its passage.

[37] Mont. Rev. Code Ann. (1935) § 9473.1.

[38] Cal. Code of Civ. Proc. (Deering, 1941) § 580b.

[39] N.C. Gen. Stat. (Michie, 1943) § 45-36.

[40] 2 JONES, MORTGAGES, 8th ed., § 1334 (1928); 2 GLENN, MORTGAGES, § 228 (1943); Durfee and Doddridge, "Redemption from Foreclosure Sale—The Uniform Mortgage Act," 23 MICH. L. REV. 825 (1925).

[41] Carey, Brabner-Smith and Sullivan, "Studies in Foreclosures in Cook County: II. Foreclosure Methods and Redemption," 27 ILL. L. REV. 595 at 609-612, 622 (1933); Tefft, "The Myth of Strict Foreclosure," 4 UNIV. CHI. L. REV. 575 (1937).

Wyoming statute[42] saves to the mortgagor the right to possession of the land, rents and profits for six months after foreclosure and sale, unless the parties have stipulated for a receiver upon default or foreclosure. A New Mexico statute[43] reserves to the mortgagor the right to possession until he can harvest crops growing at the time foreclosure proceedings were commenced, if this date is later than March 15 of any year. These statutes have relatively little effect on the overall picture.

It is apparent from this survey that developments of the decade of the 1930's have left a lasting mark on mortgage doctrines. These statutory provisions stand as potential protection for many land purchasers and home builders who have subjected their property to mortgages at present high prices, in the event of an economic recession.[44]

John F. Buchman, III, S.Ed.

---

[42] Wyo. Comp. Stat. (1945) § 3-4304.

[43] N.M. Stat. Ann. (1941) § 21-217.

[44] A thorough discussion of depression developments in mortgage law may be found in SKILTON, GOVERNMENT AND THE MORTGAGE DEBTOR—1929 TO 1939 (1944).